(9)

No. 90-1056-CSX
Status: GRANTED

Title: Charles W. Burson, Attorney General and Reporter for Tennessee, Petitioner
v.
Mary Rebecca Freeman

Docketed:
December 28, 1990

Court: Supreme Court of Tennessee, Middle Division

Counsel for petitioner: Burson,Charles W.

Counsel for respondent: Herbison,John, Morrison,Alan B.

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Entry	Date	Note	Proceedings and Orders
1	Dec 28 1990	G	Petition for writ of certiorari filed.
2	Jan 28 1991		Waiver of right of respondent Mary Rebecca Freeman to respond filed.
3	Feb 6 1991		DISTRIBUTED. February 22, 1991
4	Feb 12 1991	P	Response requested -- JPS. (Due March 14, 1991)
6	Mar 11 1991		Order extending time to file response to petition until March 28, 1991.
7	Mar 25 1991		Brief of respondent Mary Rebecca Freeman in opposition filed.
8	Mar 27 1991		REDISTRIBUTED. April 12, 1991
9	Apr 15 1991		Petition GRANTED.
			**********
11	May 3 1991		Order extending time to file brief of petitioner on the merits until June 13, 1991.
12	May 30 1991		Joint appendix filed.
13	Jun 13 1991		Brief of petitioner Charles W. Burson, etc. filed.
14	Jun 13 1991		Brief amicus curiae of National Conference of State Legislatures, et al. filed.
15	Jun 14 1991		Brief amici curiae of Arizona, et al. filed.
17	Jul 9 1991		Order extending time to file brief of respondent on the merits until August 2, 1991.
18	Jul 15 1991		CIRCULATED.
19	Jul 19 1991		SET FOR ARGUMENT TUESDAY, OCTOBER 8, 1991. (2ND CASE)
20	Jul 25 1991		Certified copy of original record received.
21	Aug 2 1991	X	Brief of respondent Mary Rebecca Freeman filed.
22	Sep 4 1991	X	Reply brief of petitioner Charles W. Burson, etc. filed.
23	Oct 8 1991		ARGUED.

90-1056

No. 90-___

In The

Supreme Court of the United States

October Term, 1990

CHARLES W. BURSON,
ATTORNEY GENERAL AND REPORTER
FOR THE STATE OF TENNESSEE,

Petitioner,

v.

REBECCA FREEMAN,

Respondent.

Petition For Writ Of Certiorari To The Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does Tenn. Code Ann. § 2-7-111 (Supp. 1990), which prohibits the distribution of campaign literature, display of campaign materials, or solicitation of votes within 100 feet of the entrance to a polling place on election day in Tennessee, violate the Free Speech Clause of the First Amendment of the United States Constitution?

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No. 90-___

In The

Supreme Court of the United States

October Term, 1990

CHARLES W. BURSON,
ATTORNEY GENERAL AND REPORTER
FOR THE STATE OF TENNESSEE,

Petitioner,

v.

REBECCA FREEMAN,

Respondent.

Petition For Writ Of Certiorari
To The Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

The petitioner urges that a writ of certiorari issue to review the judgment and opinion of the Tennessee Supreme Court entered in the above-entitled proceeding on October 1, 1990. That opinion is yet to be reported but is set forth at pages 7a through 20a of the Appendix to the petition for writ of certiorari.

STATEMENT OF THE CASE

This case concerns a facial challenge to the constitutionality of Tenn. Code Ann. § 2-7-111 (Supp. 1990) which prohibits the distribution of campaign literature, the display of campaign materials, or solicitation of votes within 100 feet of the entrance to a polling place on election day in Tennessee.[1] This statute was originally enacted as part of a major revision of Tennessee's Election Code in 1972. *See* 1972 Tenn. Pub. Acts Ch. 740, § 2-711. The legislative debates of this original enactment do not indicate any discussion of the language of Tenn. Code Ann. § 2-7-111 (Supp. 1990). Thus, any legislative intent with respect to Tenn. Code Ann. § 2-7-111 (Supp. 1990) will have to be ascertained from the four corners of the statute.

Since this case involves a facial challenge to the statute, the facts are sparse and undisputed. In the summer of 1987, the respondent, Rebecca Freeman, was the campaign treasurer for the election of Tom Watson to the City Council for Metropolitan Nashville-Davidson County, Tennessee. Ms. Freeman received information to indicate that as a result of the issuance of an opinion by the Tennessee Attorney General on April 2, 1987, campaign workers would not be allowed to go onto the property of polling places to distribute campaign materials even beyond the 100 foot boundary set forth by Tenn. Code Ann. § 2-7-111 (Supp. 1990).[2]

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[1] Violation of this statutory provision is a misdemeanor while the 100 foot boundary signs are posted. Tenn. Code Ann. § 2-19-119 (Supp. 1990).

[2] The opinion of the Tennessee Attorney General of April 2, 1987 interpreted the phrase "on the grounds" in the

(Continued on following page)

As a result of her misperception as to the Tennessee Attorney General's interpretation of Tenn. Code Ann. § 2-7-111 (Supp. 1990), Ms. Freeman filed suit in Davidson County Chancery Court. The original focus of Ms. Freeman's challenge was two-fold: (1) the constitutionality of the prohibition of the display of campaign signs on polling place grounds, and (2) a challenge to the constitutionality of the 100 foot boundary.

Only two witnesses testified at the trial on October 24, 1988, namely: Ms. Freeman and Constance Ann Alexander, the Registrar-at-Large for Metropolitan Nashville-Davison County. As Registrar-at-Large, Ms. Alexander was responsible for conducting all elections in Davidson County. Prior to her appointment as Registrar-at-Large, Ms. Alexander served as a Deputy Registrar-at-Large for approximately ten years. The testimony of both witnesses focused upon the operation of the 100 foot boundary rule

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following relevant part of Tenn. Code Ann. § 2-7-111(b) (Supp. 1990): "No campaign posters, signs or other campaign literature may be displayed on or in any building or on the grounds of any building in which a polling place is located." That phrase was interpreted by the Tennessee Attorney General to mean "that campaign posters, signs or other campaign literature may not be displayed either within the 100 foot boundary or, in the event the property line of the building where the polling place is located extends beyond the 100 foot boundary, within the property line." This opinion interpreted the statute to prohibit the placement of signs on the grounds of a polling place but did not state that individuals were prohibited from distributing campaign materials and soliciting votes outside the 100 foot boundary. Appendix at 3a-4a.

in the past and the possible effects of the elimination of 100 foot boundary rule for future elections.

In the past, Ms. Alexander witnessed as many as ten or more campaign workers at particular polling places distributing campaign materials outside the 100 foot boundary on election day. Furthermore, according to Ms. Alexander, individuals have been able to solicit votes and distribute campaign materials outside the 100 foot boundary even where the 100 foot boundary went beyond the grounds of the polling place. Likewise, Ms. Freeman admitted that she had in fact distributed materials and solicited votes beyond the 100 foot boundary at elections in Tennessee over the past seventeen years.

As for the distribution of materials unrelated to the election such as commercial, charitable or religious solicitations, Ms. Alexander was unaware of any incident where either a private company or a religious denomination distributed literature or material at a polling place on election day in Nashville. On the other hand, Ms. Freeman had a vague recollection of a single commercial solicitation occurring at a polling place in the past. But she could not recall any specifics with respect to that single incident and knew of no religious solicitations.

As for the effect of abolishing the 100 foot boundary rule, it was the opinion of Ms. Alexander as Registrar-at-Large that there would be confusion and congestion at the polling places. She indicated that at present, there are already a number of individuals located in a polling place including voters, election officials, voting machines technicians and poll watchers.[3] If individuals are allowed to

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[3] According to Ms. Alexander, each candidate is entitled to have an individual at each polling place to watch the voting

(Continued on following page)

solicit votes in and around the polling place, it was the opinion of Ms. Alexander that there would be confusion and the possibility of errors made by election officials in the tabulation of votes. Likewise, Ms. Alexander was concerned with respect to potential congestion which would occur if campaign workers were allowed to solicit votes in and around the entrance to a polling place. Although Tennessee has other statutes which impose criminal sanctions for intimidation of voters, it was Ms. Alexander's opinion that such statutes would not alleviate the confusion, congestion and possible errors which would be created by the abolishment of the 100 foot boundary.

STATUTORY PROVISION INVOLVED

Tenn. Code Ann. § 2-7-111 (Supp. 1990): **Posting of sample ballots and instructions – Arrangement of polling place – Restrictions.** – (a) The officer of elections shall have the sample ballots, voting instructions, and other materials which are to be posted and placed in conspicuous positions inside the polling place for the use of voters. The officer shall measure off one hundred feet (100') from the entrances to the building in which the election is to be held and place boundary signs at the

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process to ensure its integrity; however, these individuals are not permitted to solicit votes.

distance. Provided, however, in any county having a population of:

not less than	nor more than
13,600	13,610
16,360	16,450
24,590	24,600
28,500	28,560
28,690	28,750
41,800	41,900
50,175	50,275
54,375	54,475
56,000	56,100
67,500	67,600
77,700	77,800
85,725	85,825

all according to the 1980 federal census or any subsequent federal census, the officer shall measure off three hundred feet (300') from the entrances to the building in which the election is to be held and place boundary signs at the distance.

(b) Within the appropriate boundary as established in subsection (a), and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building or on the grounds of any building in which a polling place is located.

(c) The officer of elections shall have each official wear a badge with his name and official title.

(d) With the exception of counties having a metropolitan form of government, any county having a population over six hundred thousand (600,000) according to the 1970 federal census or any subsequent federal census, and counties having a population of between two hundred fifty thousand (250,000) and two hundred sixty thousand (260,000) by the 1970 census, any county may, by private act, extend the one hundred foot (100') boundary provided in this section. [Acts 1972, ch. 740, § 1; T.C.A., § 2-711; Acts 1980, ch. 543, §§ 1, 2, 1987, ch. 362, §§ 1, 2, 4.]

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE DECISION OF THE TENNESSEE SUPREME COURT DECLARING TENN. CODE ANN. § 2-7-111 (SUPP. 1990) TO VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION IS INCONSISTENT WITH PRINCIPLES ENUNCIATED BY THIS COURT IN THE *CITY OF RENTON, BOOS, WARD* AND *KOKINDA* DECISIONS.

It is the position of the petitioner that Tenn. Code Ann. § 2-7-111 (Supp. 1990) is a reasonable time, place and manner regulation of free speech. This court has established standards by which to assess whether a time, place and manner regulation of free speech meets constitutional muster. In the decision of *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court stated that a government "may adopt reasonable time, place and manner regulations, which do not discriminate among speakers or ideas, in

order to further an important governmental interest unrelated to the restriction of communication." *Id.* at 18.

Subsequent to the *Buckley* decision, this Court has developed a three step test with respect to determining the validity of time, place and manner restrictions. First, the restriction "may not be based upon either the content or subject matter of speech." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537 (1980). Second, a valid time, place and manner regulation must also "serve a significant governmental interest." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). Third, if the place and manner restriction is limiting what is otherwise a public forum, it must also be sufficiently clear that alternative forums are available. *Heffron v. The International Society for Krishna Consciousness*, 452 U.S. 640, 655 (1978).

The Tennessee Supreme Court concluded that Tenn. Code Ann. § 2-7-111 (Supp. 1990) "is content-based because it regulates a specific subject matter, the solicitation of votes and the display or distribution of campaign materials, and a certain category of speakers, campaign workers." *Freeman v. Burson*, slip op., appendix 14a (October 1, 1990). This conclusion conflicts with the principles enunciated by this court in four decisions: *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Boos v. Barry*, 108 S.Ct. 1157 (1988); *Ward v. Rock Against Racism*, 109 S.Ct. 2746 (1989); and *United States v. Kokinda*, 110 S.Ct. 3115 (1990).

In the *City of Renton* case, this Court was confronted with an ordinance which prohibited any "adult motion picture theatre" from locating within 1000 feet of any residential zone, single or multi-family dwelling, church

or park and within one mile of any school. In writing the opinion for the majority, then Justice Rehnquist upheld the ordinance as being content-neutral for the following reason:

> The *Renton* ordinance is aimed not at the content of the film shown at "adult motion picture theatres", but rather at the secondary effects of such theatres on the surrounding community. The district court found that the city council's "predominant concerns" were with the secondary effects of adult theatres, and not with the content of adult films themselves.

City of Renton, 475 U.S. at 47.

The fact that "adult movie theatres" as opposed to all other types of movie theatres were affected by this restriction did not render the ordinance content-based since the predominant intent of the City Council in enacting the regulation was related to "the City's pursuit of its zoning interests . . . unrelated to the suppression of free expression." *Id. See also, Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 at 771 (1976); *Clark v. Community of Creative Non-Violence*, 468 U.S. 288 at 293 (1984); *Heffron v. International Society of Krishna Consciousness*, 452 U.S. 648 at 655 (1978).

The Tennessee Supreme Court rejected the application of the "secondary effect" analysis in the *City of Renton* case on the grounds that the opinion was limited to "businesses that purvey sexually explicit materials" and did not apply to statutes limiting political expression. *Freeman v. Burson*, slip op., appendix at 13a (October 1, 1990). In particular, the Tennessee Supreme Court noted that this Court "avoided the *City of Renton* formula when it next considered a political speech case, namely the *Boos*

decision." *Id*. However, the *Boos* decision in fact provides the strongest support for the petitioner's contention that the secondary effect analysis of the *City of Renton* decision is applicable to Tenn. Code Ann. § 2-7-111 (Supp. 1990).

In the *Boos* case, this Court was confronted with a restriction on picketing in front of foreign embassies in Washington, D.C. In particular, the ordinance prohibited the "display of any flag, banner, plaque, or device designed or adapted to intimidate, coerce, or bring into odium any foreign government within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representatives." *Boos*, 108 S.Ct. at 1160. In writing the opinion for the Court, Justice O'Connor held that the ordinance was content-based because "the government has determined that an entire category of speech – signs or displays critical of foreign governments – is not to be permitted." *Id*.[4]

In concluding that the regulation was content-based, Justice O'Connor did not reject the applicability of the secondary effect analysis of the *City of Renton* case. Rather, the secondary effect justification asserted by the government was found to be content-based. In particular, Justice O'Connor stated the following:

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[4] The government had contended that the statute was not content-based because the government "is not itself selecting between view points; the permissible message on a picket sign is determined solely by the policy of a foreign government." *Boos*, 108 S.Ct. at 1163. However, this argument was rejected by the Court. *Id*.

Applying these principles to the case at hand leads readily to the conclusion that the display clause is content-based. The clause is justified *only* by reference to the content of speech. Respondents and the United States do not point to the "secondary effects" of picket signs in front of embassies. They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies. Rather, they rely on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments. This justification focuses only on the content of the speech and the direct impact that speech has on its listeners. The emotive impact of speech on its audience is not a "secondary effect". Because the display clause regulates speech due to its potential primary impact, we conclude it must be content-based.

Id. at 1164. Thus, the government lost the *Boos* case not because of a refusal by this Court to apply the secondary effect analysis of the *City of Renton* case to political expression, but rather because the government had failed to provide a content-neutral secondary effect justification for the ordinance.

In the *Ward* case, this Court was confronted with a municipal noise regulation designed to ensure that music performances in a band shell owned by the City of New York did not disturb surrounding residents. In writing the opinion for the Court, Justice Kennedy cited the *City of Renton* case for the proposition that "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 109 S.Ct. at 2754. Furthermore, the *Boos* decision was cited by

Justice Kennedy for the proposition that "government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.' " *Id.* Based upon these principles, Justice Kennedy concluded that on the record in this case, "the City's concern with sound quality extends only to clearly content-neutral goals of ensuring adequate sound amplification and avoiding the problems associated with inadequate sound mix." *Id.*

In the *Kokinda* case, this Court was confronted with a challenge to the constitutionality of a postal regulation which prohibited solicitation on postal premises. 39 CFR § 232.2(h)(1). Justice O'Connor, in writing the plurality opinion for the Court, held that a sidewalk leading to a post office was not a public forum meaning that the "government's decision to restrict access to a nonpublic forum need only be *reasonable* . . . " *Kokinda*, 110 S.Ct. at 3122 (O'Connor, J., plurality). Furthermore, Justice O'Connor noted that the Postal Service had "not expressly dedicated its sidewalks to any expressive activity." *Id.* at 3121. In his concurring opinion, Justice Kennedy concluded that it was unnecessary to determine the public versus nonpublic forum issue because "the postal regulation at issue meets the traditional standards we have applied to time, place and manner restrictions of protected activity." *Kokinda*, 110 S.Ct. at 3125-26 (Kennedy, J., concurring).

The decision of the Tennessee Supreme Court in this case conflicts with the principles enunciated in *City of Renton, Boos, Ward* and *Kokinda*. The justification for the 100 foot boundary in the present is not the content of Ms.

Freeman's speech, i.e. political versus religious or commercial. Rather, the justification relates to secondary effects created in the absence of the regulation such as congestion, interference with ingress and egress to the polling place and overall confusion in the voting process. The fact that political speech, as opposed to commercial speech or religious speech is being restricted in this instance does not render the regulation content-based.

Tenn. Code Ann. § 2-7-111 (Supp. 1990) is intended to deal with congestion and confusion caused by campaign workers at polling places on election day soliciting votes and distributing campaign literature. The undisputed evidence at trial indicated that such campaign workers are at polling places in numbers as many as ten on election day; whereas, commercial, charitable and religious solicitors are virtually non-existent. By restricting election related activities at a polling place on election day, Tennessee has addressed existing and not hypothetical problems. Accordingly, it is the position of the petitioner that the decision of the Tennessee Supreme Court holding Tenn. Code Ann. § 2-7-111 (Supp. 1990) to be content-based is inconsistent with the principles enunciated in the decision by this Court in the *City of Renton, Boos* and *Ward* cases.

Furthermore, it is the position of the petitioner that sidewalks within 100 feet of the entrance to a polling place are not public fora within the meaning of *Kokinda*. It is undisputed that Tenn. Code Ann. § 2-7-111 is a "reasonable" regulation. *Freeman v. Burson*, slip op., appendix at 15a-16a (state failed least restrictive means test as to Tenn. Code Ann. § 2-7-111, but met the compelling state interest test). Therefore, the decision of the Tennessee

Supreme Court also conflicts with the principles in *Kokinda*.[5]

As for decisions by other state supreme courts or federal courts of appeals, there are two decisions with respect to polling place regulations both of which are distinguishable from the present case. *See Daily Herald Co. v. Munro*, 838 F.2d 380, 386 (9th Cir. 1988) (Ninth Circuit in concluding that the prohibition against exit polling was not content-neutral indicated the "State's true motive [for the prohibition] was to prevent the media from broadcasting election results before the polls closed."); *Clean Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985) (Statute which prohibited solicitation of signatures on a petition unrelated to matters on the ballot was held to be unconstitutionally overbroad in that the statute prohibited activity which did not cause voter disruption or confusion).[6]

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[5] It should be noted that the *Kokinda* decision was rendered after the oral arguments in this case. Thus, neither party presented any arguments concerning the *Kokinda* reasoning to the Tennessee high court.

[6] Since the Tennessee Supreme Court found that Tenn. Code Ann. § 2-7-111 was content-based, then it did not address the question of whether the statute furthered significant state interests and provided alternate channels of communication which are the second and third prongs for testing whether a regulation of speech does so in reasonable time, place and manner. However, the petitioner also contends that: (1) Tenn. Code Ann. § 2-7-111 does further a significant state interest in

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II.

THE DECISION OF THE TENNESSEE SUPREME COURT HOLDING TENN. CODE ANN. § 2-7-111 (SUPP. 1990) IN VIOLATION OF THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION RAISES A SERIOUS QUESTION OF NATIONAL IMPORTANCE REGARDING THE AUTHORITY OF STATES TO MAINTAIN ORDER IN REGULATING THE CONDUCT OF ELECTIONS.

Tenn. Code Ann. § 2-7-111 (Supp. 1990) is not a unique statute among the states. In fact, every single state in this country has some type of regulation regarding activities in and outside of polling places on election day. Attached to this petition is a chart of the polling place statutes in all fifty states along with each of the relevant statutes. *See* Appendix 21a-50a.

A review of these polling place statutes reveals two interesting points with respect to Tenn. Code Ann. § 2-7-111 (Supp. 1990). First, the 100 foot boundary is well within the average among all of the states. There are thirty-six (36) other states which provide for a

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ensuring that the election process at the polling place is conducted in an orderly manner with as little confusion as possible so as to preserve the integrity of the election process with as few mistakes as possible by election officials; and (2) Tenn. Code Ann. § 2-7-111 allows for alternate channels of communication by permitting Ms. Freeman and other campaign workers to solicit votes and distribute campaign materials outside the 100 foot boundary. Accordingly, Tenn. Code Ann. § 2-7-111, contrary to the pronouncement by the Tennessee Supreme Court, is a reasonable time, place and manner regulation.

boundary of 100 feet or more. Second, and more importantly, forty (40) states, like Tennessee, have some form of election related restriction inside the designated boundary. These restrictions vary from prohibiting "electioneering" to a ban on the distribution of campaign literature.

In addition to the national significance of the polling place regulations vis-a-vis the fact that every state has some form of polling place regulation, this Court has indicated that "preserving the integrity of the electoral process, preventing corruption and sustaining the act of alert responsibility of the individual citizen in a democracy for the wise conduct of government are all interest of the highest importance." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788 (1978)

The ability of states to regulate speech activities around the polling place on election day is a serious question of national importance. It is not an academic question concerning the ability of a state to exercise authority in an area of only minor significance. Rather, the issue in this case concerns the ability of every state in this country to continue to regulate election day speech activities at the polling place in order to ensure orderly, fair and honest elections.

CONCLUSION

Based upon the decisions of this Court in the *City of Renton, Boos, Ward* and *Kokinda* cases along with the fact that every state in this country has some form of regulation concerning speech activities around polling places on election day, the petitioner urges this Court to grant the petition for writ of certiorari.

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MARY REBECCA FREEMAN	) IN THE CHANCERY
VS. No. 87-1763-I	) COURT FOR THE
	) STATE OF TENNESSEE
CHARLES W. BURSON, IN	) 20TH JUDICIAL
HIS CAPACITY AS	) DISTRICT
ATTORNEY GENERAL AND	) DAVIDSON COUNTY
REPORTER FOR THE STATE	) PART ONE
OF TENNESSEE, ET AL.	)

MEMORANDUM

(Filed 1989 Apr 26)

This action came on for trial on the complaint of the plaintiff Mary Rebecca Freeman seeking a Declaratory Judgment that T.C.A. § 2-7-111 violates the First and Fourteenth Amendments to the United States Constitution, Art. 1, § 8, 19 and Art. 11, § 8 of the Tennessee Constitution. Further, plaintiff seeks a permanent injunction against the enforcement of T.C.A. §§ 2-7-111 and 2-19-119 which provides criminal penalties for violation of T.C.A. § 2-7-111. The defendant Charles W. Burson, the Attorney General and Reporter for the State of Tennessee contends that T.C.A. § 2-7-111 does not violate the Constitutions of the State of Tennessee or the United States.

Pursuant to Rule 41.01 of the Tennessee Rules of Civil Procedure, the plaintiff has nonsuited her complaint as to defendant Metropolitan Government of Nashville, Davidson County, Tennessee.

Findings of Fact

For evidentiary purposes of the trial, the parties have stipulated to the following facts which the Court adopts:

1. Mary Rebecca Freeman is a resident and citizen of Nashville, Davidson County, Tennessee. She is an attorney licensed to practice law by the State of Tennessee. She is a member of the Davidson County Democratic Executive Committee, having been chose [sic] for such office by popular election in democratic primary elections in 1976, 1978, 1980, 1982, 1984 and 1986.

2. The defendant, Charles W. Burson, is a resident and citizen of Nashville, Davidson County, Tennessee. He is employed as Attorney General and Reporter for the State of Tennessee and is sued in his official capacity only. He succeeded the former defendant, W. J. Michael Cody as Attorney General and Reporter on October 1, 1988. Pursuant to Rule 25.04, Charles W. Burson was automatically substituted as party defendant in this case.

3. The relevant portion of T.C.A. § 2-7-111, which the plaintiff challenges is as follows:

> (a) The officer of elections shall have the sample ballots, voting instructions, and other materials which are to be posted placed [sic] [in conspicuous positions inside the polling place] for the use of voters. The officer shall measure off one hundred feet (100') from the entrances to the building in which the election is to be held and place boundary signs at that distance. Provided, however, in any county having a population of:

Not less than	Nor more than
13,600	13,610
16,350	16,450
24,590	24,600
28,500	28,560

41,800	41,900
50,175	50,275
54,375	54,475
56,000	56,100
67,500	67,600
77,700	77,800
85,725	77,825

> all according to the 1980 federal census or any subsequent federal census, the officer shall measure off three hundred feet (300') from the entrances to the building in which the election is to be held and place boundary signs at that distance.
>
> (b) Within the appropriate boundary as established in subsection (a), and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on any question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building or on the grounds of any building in which a polling place is located.

4. On April 2, 1987, W. J. Michael Cody, as Attorney General and Reporter of the State of Tennessee, issued an Opinion with respect to the display of campaign posters, signs and other campaign literature beyond the 100-foot boundary, but still on the polling place grounds. In that Opinion, the Attorney General stated the following:

> It is the opinion of this office that the phrase 'on the grounds', in the context of T.C.A. § 2-7-111(b) means that campaign posters, signs or other campaign literature may not be displayed either within the 100-foot

boundary or, in the event the property line of the building where the polling place is located extends beyond the 100-foot boundary, within the property line.

That Opinion is attached to these Stipulations and marked as Exhibit No. 1.

5. The plaintiff contends that T.C.A. § 2-7-111 and § 2-19-119 on their face violate the following constitutional provisions: (1) First Amendment to the United States Constitution, (2) Fourteenth Amendment to the United States Constitution, (3) Article 1, § 19 of the Tennessee Constitution, (4) Article 1, § 8 of the Tennessee Constitution, and (5) Article XI, § 8 of the Tennessee Constitution.

6. The defendant contends that T.C.A. § 2-7-111 does not violate any provision of either the Tennessee or United States Constitutions.

7. The plaintiff has a present intention to continue to solicit votes and disseminate campaign literature at polling places in future elections.

Plaintiff, who is a registered voter in Davidson County, Tennessee, testified concerning her political activities as an officeholder and as a worker or participant in various state and federal political campaigns. She contends that because of the 100 foot boundary restriction at the polling places, she is unable to reach voters in some precincts. However, she has solicited votes beyond the 100 foot boundary restriction.

Ann Alexander, Registrar-at-Large for Davidson County, testified on behalf of the defendant. She stated to the effect that but for the 100 foot restriction, there would be interference with voting, confusion and overcrowding

at the polling places and mistakes made by election officials.

Conclusions of Law

The issue presented for determination is whether T.C.A. § 2-7-111 violates the provisions of the Constitutions of Tennessee and the United States.

Based upon the findings of fact and the presumption that T.C.A. § 2-7-111 is constitutional, the Court makes the following declarations with respect to the rights of the parties:

1. The Court has jurisdiction of this declaratory judgment action pursuant to T.C.A. § 29-14-101, *et seq.*

2. T.C.A. § 2-7-111 is reasonable as to time, place and manner of the speech in question. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537 (1980); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

3. The speech restricted in T.C.A. § 2-7-111 is content neutral; that is, there is no reference to the content of the campaign materials to be displayed or distributed. *See Boos v. Barry*, 485 U.S. ___, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988).

4. The 100 foot boundary rule of the defendant government serves a compelling state interest with respect to the protection of voters and election officials from interference, harassment or intimidation during the voting process. *See* T.C.A. § 2-1-102 and *Emery v. Robertson*

County Election Commission, 586 S.W.2d 103, 109 (Tenn. 1979).

5. The plaintiff has alternate channels to exercise her speech; that is, she is free to distribute campaign materials and solicit votes 100 feet from the polling place. *See Heffron v. International Society for Krishna Consciousness, Inc., et al.*, 452 U.S. 640, 655, 101 S. Ct. 2559 (1981).

5. T.C.A. § 2-7-111 is not unconstitutional for vagueness because a person of ordinary intelligence can understand its meaning. *See State v. Lindsay*, 637 S.W.2d 886, 889 (Tenn. 1982).

6. Plaintiff does not have standing to challenge the constitutionality of the 300 foot boundary in twelve (12) counties described in T.C.A. § 2-7-111(a), because she is not a resident of those counties. She is a resident of Davidson County where the 100 foot boundary is applicable. *See* T.C.A. § 2-1-102(2).

Accordingly, the Court finds that T.C.A. § 2-7-111 does not violate the First and Fourteenth Amendments to the United States Constitution, nor Art. 1, § 8 and 19 or Art. 11, § 8 of the Tennessee Constitution.

General Catalano shall prepare an appropriate order. The costs are taxed to the plaintiff.

/s/ Irvin H. Kilcrease Jr
IRVIN H. KILCREASE, JR.
CHANCELLOR

April 26, 1989
cc: John E. Herbison
Michael W. Catalano

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

MARY REBECCA FREEMAN, Plaintiff-Appellant, V. CHARLES W. BURSON, Defendant-Appellee.	*FOR PUBLICATION* *Filed* *October 1, 1990* DAVIDSON CHANCERY Hon. Irvin H. Kilcrease, Jr. Chancellor No. 89-46-I (Filed Oct 01 1990)

For Plaintiff-Appellant:
John E. Herbison
Nashville, Tennessee

For Defendant-Appellee:
Charles W. Burson
Attorney General and Reporter

Michael W. Catalano
Deputy Attorney General
Nashville, Tennessee

OPINION

REVERSED. DROWOTA, C.J.

Tenn. Code Ann. §2-7-111 prohibits the solicitation of votes and the display of campaign materials within a 100-foot radius of polling places on election day. Tenn. Code Ann. §2-19-119 fixes criminal penalties for violations of Section 2-7-111. Plaintiff brought suit in Davidson County Chancery Court, seeking a permanent injunction against enforcement of these statutes and a declaratory judgment that the statutes are unconstitutional under both the

United States and Tennessee Constitutions. The Chancellor held the statutes constitutional and dismissed Plaintiff's suit. For the following reasons, we now reverse the Chancellor's judgment.

Plaintiff, Mary Rebecca Freeman, is a resident of Davidson County who has served on a local party executive committee many times. She testified that she has been a candidate for office, has managed local campaigns, and has worked actively in state-wide elections.

Plaintiff testified that personal solicitation and other election place campaigning methods are especially important in district-specific races because mass media is prohibitively expensive and is ineffective to target small locales and minor issues. Plaintiff stated that the 100-foot ban on personal solicitation and display or distribution of campaign materials has limited her ability to communicate with voters. Her proof showed that in some instances the 100-foot boundary extends onto the sidewalks and streets adjacent to the polling places. In other instances it permits some campaign activity on the grounds of the polling place if the grounds are sufficiently large. Plaintiff also testified that she had seen some commercial solicitation occur at polling places.

On behalf of the State, Constance Ann Alexander, the Davidson County Registrar and former executive secretary for the election commission, testified about the conduct of elections. She stated that she had personally observed campaign workers thrusting handbills into the windows of voters' cars on the polling premises. She had never observed commercial or religious solicitation within the 100-foot boundary. She testified additionally

that she was aware the 100-foot boundary sometimes extended into the street.

In Ms. Alexander's view, elimination of the boundary would result in disruption and confusion, especially in larger and more heated elections. She testified that without the 100-foot boundary there would be a greater possibility for error in tabulating votes and in keeping track of the voters. Additionally, voting locations would be overcrowded, and people would campaign inside polling places. Ms. Alexander's specific testimony about confusion, error, and disruption, however, related to the numbers of persons present in the polling place itself.

In a memorandum opinion filed April 26, 1989, the Chancellor upheld the challenged statutes, finding that Section 2-7-111 was a content-neutral, reasonable time, place, and manner restriction; that the 100-foot boundary served a compelling state interest in protecting voters from interference, harassment, and intimidation during the voting process; and that there was an alternative channel for Plaintiff to exercise her free speech rights outside the 100-foot boundary. Because the constitutionality of statutes are the sole determinative issues, Plaintiff's appeal from the Chancellor's judgment is directly to this Court pursuant to Tenn. Code Ann. §16-4-108.

Plaintiff argues that the statutes at issue facially violate the First and Fourteenth Amendments to the United States Constitution and Article I, §19, Article I, §8, and Article XI, §8 of the Tennessee Constitution. The principal statute challenged in this instance, Tenn. Code Ann. §2-7-111, states in relevant part:

(a) The officer of elections shall have the sample ballots, voting instructions, and other materials which are to be posted placed in conspicuous positions inside the polling place for the use of voters. The officer shall measure off one hundred feet (100') from the entrances to the building in which the election is to be held and place boundary signs at that distance. Provided, however, in any county having a population of:

not less than	nor more than
13,600	13,610
16,350	16,450
24,590	24,600
28,500	28,560
41,800	41,900
50,175	50,275
54,375	54,475
56,000	56,100
67,500	67,600
77,700	77,800
85,725	85,825

all according to the 1980 federal census or any subsequent federal census, the officer shall measure off three hundred feet (300') from the entrances to the building in which the election is to be held and place boundary signs at that distance.

(b) Within the appropriate boundary as established in subsection (a), and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building or on the grounds

of any building in which a polling place is located.[1]

The above statute regulates political speech, which is the most highly protected form of speech. "Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *EU v. San Francisco City Democratic Central Committee*, 1189 U.S. ___, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989). *See also Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 903 (1987). The State argues, though, that Section 2-7-111 is a constitutionally valid time, place, and manner restriction of political speech.

The State may enforce reasonable time, place, and manner regulations of expressive conduct as long as the restrictions "are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United*

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[1] The remaining text of the statute is as follows:

2-7-111. Posting of sample ballots and instructions – Arrangement of polling place – Restrictions. . . .

(c) The officer of elections shall have each official wear a badge with his name and official title.

(d) With the exception of counties having a metropolitan form of government, any county having a population over six hundred thousand (600,000) according to the 1970 federal census or any subsequent federal census, and counties having a population of between two hundred fifty thousand (250,000) and two hundred sixty thousand (260,000) by the 1970 census, any county may, by private act, extend the one hundred foot (100') boundary provided in this section. [Acts 1972, ch. 740, §1; T.C.A., §2-711; Acts 1980, ch. 543, §§1, 2; 1987, ch. 362, §§1, 2, 4.]

States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983) (quoting *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)). In order for Section 2-7-111 to qualify as a reasonable time, place, and manner restriction, the State must first show that the statute is content-neutral. The state insists that the statute is content-neutral because it does not discriminate against speakers or ideas and furthers an important governmental interest – the integrity and orderliness of the voting process – unrelated to the restriction of communication. *See Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). While the State admits that the statute on its face criminalizes only political speech and political activity, the State points out that the statute does not discriminate on the basis of political viewpoints. The State contends that the rationale of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 is controlling.

City of Renton dealt with an ordinance which prohibited any "adult motion picture theatre" from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school. The U.S. Supreme Court upheld the ordinance as content-neutral because "[t]he ordinance is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theatres on the surrounding community." *Id* at 47, 106 S.Ct. at 929. The State insists that the statute in question is likewise aimed at the "secondary effects" of political activity at the polling places – crowds, confusion, intimidation of voters, etc. – rather than at the speech itself.

We reject the State's argument. The Court in *City of Renton* limited its opinion to businesses that purvey sexually explicit materials and distinguished that type of expression as one for which society's interest is of a different and lesser magnitude than society's interest in protecting the kind of political expression at issue in the instant case. *See City of Renton*, 475 U.S. at 49, n. 2, 106 S.Ct. at 929, n. 2. In contrast to the restrictive zoning of pornography outlets, the statutes challenged in this case limit political expression, which "is at the core of our electoral process and of the First Amendment freedoms[,]" *Williams v. Rhodes*, 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968), "an area in which the importance of First Amendment protection is 'at its zenith.'" *Meyer v. Grant*, 486 U.S. 414, ___, 108 S.Ct. 1886, 1894, 100 L.Ed.2d 425 (1988). We note that the Supreme Court avoided the *Renton* formula when it next considered a political speech case. *See Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). We note also that at least two courts have refused to apply *Renton* in cases involving political activity near polling places. *See Finzer v. Barry*, 798 F.2d 1450, 1469, n. 15 (D.C. Cir. 1986), *cert. granted sub nom. Boos v. Barry*, 479 U.S. 1083, 107 S.Ct. 1282, 94 L.Ed.2d 141 (1987); *Florida Committee For Liability Reform v. McMillan*, 682 F.Supp. 1536 (M.D. Fla. 1988).

Even if the *Renton* analysis can be applied to political expression, it is not available to defend the statutes in question in this case. The lower level of scrutiny applied to content-neutral regulation is available only if the asserted governmental interest is unrelated to the suppression of speech. *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). However,

the State put on no proof that the display or distribution of campaign materials or the solicitation of votes near polling places has a different effect from that of the communication of other messages at polling places. In fact, the State's witness, Ms. Alexander, admitted on cross-examination that if there were persons soliciting for charitable organizations inside the 100-foot boundary that would pose the same kind of problems as persons soliciting votes inside that boundary. We, therefore, find that Section 2-7-111 is content-based because it regulates a specific subject matter, the solicitation of votes and the display or distribution of campaign materials, and a certain category of speakers, campaign workers.

Regulations which restrain speech on the basis of its content presumptively violate the First Amendment. *National Broadcasting Co., Inc. v. Cleland*, 697 F.Supp. 1204, 1211 (N.D. Ga. 1988); *City of Renton*, 475 U.S. at 46-47, 106 S.Ct. at 728-29. Such a regulation may be upheld only if the State can prove that "the burden placed on free speech rights is justified by a compelling state interest. The least intrusive means must be utilized by the State to achieve its goals and the means chosen must bear a substantial relation to the interest being served by the statute in question." *Bemis*, 731 S.W.2d at 903.

The State's rationale for the 100-foot "buffer zone" around polling places is the prevention of interference with voting, confusion, mistakes, and overcrowding at polling places. States certainly have an interest in maintaining peace, order and decorum at the polls and "preserving the integrity of their electoral processes." *Brown v. Hartlage*, 456 U.S. 45, 52, 102 S.Ct. 1523, 1528, 71 L.Ed.2d 732 (1982); *Mills v. Alabama*, 384 U.S. 214, 218, 86

S.Ct. 1434, 1436, 16 L.Ed.2d 484 (1966). The State unquestionably has shown a compelling interest in banning solicitation of voters or distribution of campaign materials *within the polling place itself*.

Tenn. Code Ann. §2-7-111, however, is not narrowly tailored to advance the State's interest. The statute at issue prohibits all campaign activity from an arc of 100 feet from *every* entrance to the polling places. In many instances this arc extends onto public streets and sidewalks. The State has not shown a compelling interest in the 100-foot radius. The specific testimony of the State's witness about confusion, error, overcrowding, etc. concerned the numbers of persons present in the polling place itself, not the numbers of persons outside the polls.

Several other courts have dealt with similar attempts to insulate the environs of the polling place from political speech. With one exception these regulations have been held to violate the First Amendment, either because they were overbroad in reaching onto private property or because they insufficiently advanced the asserted governmental interest. *See Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988) (ban on exit polling within 300 feet of polling place); *Committee for Sandy Springs, Georgia, Inc. v. Cleland*, 708 F.Supp. 1289 (N.D. Ga. 1988) (ban on soliciting signatures for petition within 250 feet of polling place); *Florida Committee for Liability Reform v. McMillian*, 682 F.Supp. 1536 (M.D. Fla. 1988) (ban on solicitation for any purpose within 150 feet of polling place); *CBS Inc. v. Smith*, 681 F.Supp. 794 (S.D. Fla. 1988) (ban on exit polling within 150 feet); *NBC v. Cleland*, 697 F.Supp. 1204 (N.D. Ga. 1988) (250 foot boundary for solicitation, distribution

of campaign literature, and exit polling); *National Broadcasting Co., Inc. v. Colburg,* 699 F.Supp. 241 (D. Mont. 1988); *Firestone v. News Press Publishing Co., Inc.,* 538 So.2d 457 (Fla. 1989) (exclusion of non-voters from area within 50 feet of polling room).

In *Florida Committee for Liability Reform v. McMillan,* 682 F.Supp. 1536 (M.D. Fla. 1988), the district court granted a preliminary injunction against enforcement of a statute prohibiting solicitation within 150 feet of polling places, holding that the statute was overbroad with respect to subject matter and geographic application. *Id.* Addressing the stated government interest of preventing voter harassment, the Court concluded:

> . . . if the quality of this interest is merely the offense suffered by a voter who approaches the polls only to be approached by a petitioner, this brief exposure to grassroots democratic process, however unpalatable to some individuals, cannot justify a restriction on speech when the offensive activity can be avoided readily by communicating a declination of interest to the petitioner.

Id. at 1542.

Likewise, if the State's interest in preventing voter interference in the case at bar consists only of shielding voters from annoying campaign workers armed with cheap ball point pens and fingernail files embossed with a candidate's name, this interest cannot justify an infringement upon free speech rights. Furthermore, Tenn.

Code Ann. §§2-19-101[2] and 2-19-115[3] adequately prohibit voter interference and intimidation.

Moreover, the statute is not the least restrictive means to serve the State's interests. A boundary which precludes solicitation near the entrances and exits of the polling place, thereby protecting the voting lines from

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[2] **2-19-101. Interfering with nominating meeting or election.** – A person commits a misdemeanor if he:

(1) Breaks up or attempts to break up any legally authorized political party nominating meeting or any election by force or violence;

(2) Assaults or attempts to assault the persons conducting the meeting or the election officials;

(3) Destroys or carries away or attempts to destroy or carry away a ballot box or voting machine; or

(4) Uses force or violence in any other way to prevent the fair and lawful conduct of the nominating meeting or election. [Acts 1972, ch. 740, §1; T.C.A., §2-1901.]

[3] **2-19-115. Violence and intimidation to prevent voting.** – It is a misdemeanor for any person directly or indirectly, by himself or through any other person:

(1) By force or threats to prevent or endeavor to prevent any elector from voting at any primary or final election;

(2) to make use of any violence, force or restraint, or to inflict or threaten the infliction of any injury, damage, harm or loss; or

(3) In any manner to practice intimidation upon or against any person in order to induce or compel him to vote or refrain from voting, to vote or refrain from voting for any particular person or measure, or on account of such person having voted or refrained from voting in any such election. [Acts 1972, ch. 740, §1; T.C.A., § 2-1915.]

congestion or undue disruption, but which permits solicitation in other yet somewhat less proximate places, might perhaps pass constitutional muster. We note that one court has held that a 25-foot boundary is valid to prevent congestion and disruption at the entrances to the polling place. *See NBC v. Cleland*, 697 F.Supp. 1204 (N.D. Ga. 1988).

However, such a limited statute, carefully drafted to protect the rights of the speakers while furthering the State's compelling interests, is not before this Court today. Accordingly, we reverse the judgment of the Chancellor and hold that Tenn. Code Ann. §§2-7-111 and 2-19-119 are constitutionally invalid. The costs of appeal are taxed to the Appellee.

/s/ Frank F. Drowota, III
FRANK F. DROWOTA, III
JUSTICE

Concur:

Cooper, O'Brien and Daughtry, JJ.

Fones, J., dissenting. See separate opinion.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

MARY REBECCA FREEMAN, Plaintiff-Appellant, V. CHARLES W. BURSON, Defendant-Appellee.	)	*FOR PUBLICATION* DAVIDSON COUNTY Hon. Irvin H. Kilcrease, Jr. Chancellor No. 89-46-I FILED OCT 01 1990

DISSENT

I respectfully dissent. The majority says that the state *unquestionably* has a compelling interest in preserving the integrity of the electoral process that would support banning solicitation of votes and distribution of campaign materials within the polling place itself. They seem to say that a ban of 25 feet from the entrance would probably pass constitutional muster. However, a 100 foot ban places an unpalatable, unjustified, unconstitutional restriction on free speech, according to the majority.

When a constitutional attack is made upon a legislative act, the Court is required to indulge every presumption in favor of its validity and resolve any doubt in favor of, rather than against, the constitutionality of the act. *Dorrier v. Dark*, 537 S.W.2d 888 (Tenn. 1976); *Memphis Publishing Co. v. City of Memphis*, 513 S.W.2d 511 (Tenn. 1974) and *Black v. Wilson*, 182 Tenn. 623, 188 S.W.2d 609 (1945). The majority has totally ignored this presumption

that binds this Court as firmly as any principle of law in the books.

The majority says that somewhere in the space of 75 feet a ban on vote solicitation becomes unconstitutional. It takes approximately 15 seconds to walk 75 feet. If the electorate of Tennessee is dependent upon the free speech available in the last 15 seconds before they enter the polling place, to cast an informed ballot, God help us.

I would indulge the presumption of validity this legislative act is entitled to receive in this Court and uphold the constitutionality of the 100 foot ban.

/s/ Wm. H. D. Fones
Wm. H. D. Fones, Justice

CHART OF POLLING PLACE STATUTES

STATE	DISTANCE[1]	CRIME[2]	ELECTION RELATED[3]	TOTAL BAN[4]	OTHER[5]
Alabama	30				
Alaska	200	X			
Arizona	150	X			
Arkansas	100	X			
California	100	X			
Colorado	100	X			
Connecticut	75	X			
Delaware	50	X			
Florida[6]	300	X			
Georgia	50			X	
Hawaii	1000	X			X
Idaho	100	X			
Illinois	100	X			X
Indiana	50	X	X		
Iowa	300		X		

CHART OF POLLING PLACE STATUTES

STATE	DISTANCE[1]	CRIME[2]	ELECTION RELATED[3]	TOTAL BAN[4]	OTHER[5]
Kansas	250	X	X		X
Kentucky	500		X		
Louisiana	600		X		
Maine	250	X	X		
Maryland	100	X	X		
Massachusetts	150	X	X		
Michigan	100	X	X		X
Minnesota	100			X	
Mississippi	150	X	X		
Missouri	25	X	X		
Montana	200		X		
Nebraska	200	X	X		
Nevada	0	X	X		
New Hampshire	10	X	X		
New Jersey	100	X	X		

CHART OF POLLING PLACE STATUTES

STATE	DISTANCE[1]	CRIME[2]	ELECTION RELATED[3]	TOTAL BAN[4]	OTHER[5]
New Mexico	100	X	X		
New York	100		X		
North Carolina	50		X		
North Dakota	100	X	X		X
Ohio	100		X		
Oklahoma	300	X	X		
Oregon	100		X		
Pennsylvania	0		X		
Rhode Island	50		X		
South Carolina	200	X	X		
South Dakota	100	X	X		
Tennessee	100	X	X		
Texas	100	X	X		
Utah	150	X	X		

CHART OF POLLING PLACE STATUTES

STATE	DISTANCE[1]	CRIME[2]	ELECTION RELATED[3]	TOTAL BAN[4]	OTHER[5]
Vermont	0		X		
Virginia	40		X		
Washington[7]	300	X	X		
West Virginia	300			X	
Wisconsin	500		X		
Wyoming	300	X	X		

Footnotes

[1] All distances are measured in feet. Some statutes refer to distances in yards; however, all distances in this chart have been coverted to feet for comparison purposes.

[2] States which provide for a criminal penalty for violation of the regulation are included in this category.

[3] "Election Related" statutes are those similar to Tenn. Code Ann. § 2-7-111 which regulate activities pertaining to the election such as distributing campaign material, soliciting votes and electioneering.

[4] Some states prohibit any persons except voters, election officials and certain other individuals assisting disabled voters from being within the restricted zone.

[5] States in this category ban other activities unrelated to the election such as charitable and commercial solicitations.

[6] This statute was declared unconstitutionally overbroad in *Clean Up '84 v. Henrich*, 759 F.2d 1511 (11th Cir. 1985) and repealed pursuant to 1987 Fla. Laws 87-184, § 5.

[7] This statute was declared unconstitutional in *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988).

POLLING PLACE STATUTES

Alabama

ALA. CODE § 17-7-17 (1988)

Except as electors are admitted to vote and persons to assist them as herein provided, and except the sheriff or his deputy, the inspectors, returning officer, clerks of elections and watchers, no person shall be permitted within 30 feet of the polling place.

Alaska

ALASKA STAT. § 15.15.170 (1990)

During the hours the polls are open, a person who is in the polling place or within 200 feet of any entrance to the polling place may not attempt to persuade a person to vote for or against a candidate proposition or question. The election judges shall post warning notices at the required distance in the form and manner prescribed by the director.

Arizona

ARIZ. REV. STAT. ANN. § 16-1018(1) (1984)

A person who commits any of the following acts is guilty of a class 2 misdemeanor:

1. Knowingly electioneers on election day within a polling place or in a public manner within 150 feet of the main outside entrance of the polling place.

Arkansas

ARK. STAT. ANN. § 7-1-103(9) (1989 Supp.)

No person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose, or do any electioneering of any kind whatsoever within 100 feet of any polling place on election day.

California

CAL. ELEC. CODE § 29470 (West 1989)

No person, on election day, shall within 100 feet of a polling place:

(a) Circulate an initiative, referendum, recall, or nomination petition or any other petition.

(b) Solicit a vote or speak to a voter on the subject of marking his ballot.

(c) Place a sign relating to voters' qualifications or speak to a voter on the subject of his qualifications except as provided in Section 14216.

(d) Do any electioneering.

As used in this section "100 feet of polling place" shall mean a distance 100 feet from the room or rooms in which voters are signing the roster and casting ballots.

Colorado

COLO. REV. STAT. § 1-13-714 (1980)

No person shall do any electioneering on the day of any election within any polling place or in any public street or room or in any public manner within 100 feet of any polling place, as publicly posted by the county clerk and recorder.

Connecticut

CONN. GEN. STAT. § 9-236 (1990 Supp)

On the day of any primary, referendum or election, no person shall solicit in behalf of the candidacy of another or himself or in behalf of any question being submitted at the election of referendum, or loiter or peddle or offer any advertising matter, ballot or circular to another person within a radius of seventy-five feet of any outside entrance in use as an entry to any polling place or in any corridor, passageway or other approach leading from any such outside entrance to such polling place or in any room opening upon any such corridor, passageway or approach, except as provided in section 9-294.

Delaware

DEL. CODE ANN. tit. 15 § 4942(a)(1981)

No election officer, challenger or any other person within the polling place or within 50 feet of the entrance to the building in which the voting room is located shall

electioneer during the conduct of the election. No political headquarters or gathering shall be permitted within that building during the conduct of the election.

Florida

FLA. STAT. § 104-36 (1982)

Any person who, within 100 yards of any polling place on the day of any election, distributes, or attempts to distribute any political or campaign material; solicits or attempts to solicit any vote, opinion, or contribution for any purpose; solicits or attempts to solicit a signature on any petition; or, except in an established place of business, sells or attempts to sell any item is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. This statute was declared unconstitutionally overbroad in *Clean Up '84 v. Henrich*, 759 F.2d 1511 (11th Cir. 1985) and repealed pursuant to 1987 Fla. Laws 87-184, § 5.

Georgia

GA. CODE ANN. § 34A1206 (1990 Supp)

(a) No person shall solicit votes in any manner or by any means or method, nor shall any person distribute any campaign literature, newspaper, booklet, pamphlet, card, sign, or any other written or printed matter of any kind, nor shall any person conduct any exit poll or public opinion poll with voters on any primary or election day:

(1) Within the boundary of the property upon which such polling place is located, within 50 feet of any polling place, or within 50 feet of the outer edge of any

building within which such polling place is established, whichever distance is less;

(2) Within any polling place; or

(3) Within 25 feet or any voter standing in line at such polling place.

(b) No person shall solicit signatures for any petition on any primary or election day:

(1) Within the boundary of the property upon which such polling place is located, within 50 feet of any polling place, or within 50 feet of the outer edge of any building within which such polling place is established, whichever distance is less;

(2) Within any polling place; or

(3) Within 25 feet of any voter standing in line at such polling place.

Hawaii

HAW. REV. STAT. § 11-132(a) (1985) 19-6

The precinct officials shall post in a conspicuous place, prior to the opening of the polls, a map designating an area of one thousand feet in radius around the polling place. Any person who remains or loiters within an area of one thousand feet in radius around the polling place for the purpose of campaigning shall be guilty of a misdemeanor.

Idaho

IDAHO CODE § 18-2318 (1987)

On the day of any primary, general or special election, no person may, within a polling place, or any building in which an election is being held, or within one hundred (100) feet thereof:

(a) Do any electioneering;

(b) Circulate cards or handbills of any kind;

(c) Solicit signatures of any kind to petition; or

(d) Engage in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place.

Illinois

ILL. REV. STAT. ch. 46 para. 17-29 (1990 Supp.)

No judge of election, pollwatcher, or other person shall, at any primary or election, do any electioneering or soliciting of votes or engage in any political discussion within any polling place or within 100 feet of any polling place; no person shall interrupt, hinder or oppose any voter while approaching within 100 feet of any polling place for the purpose of voting.

Indiana

IND. CODE § 3-14-3-16 (1988)

A person who knowingly does any electioneering on election day within the polls or within 50 feet of the polls commits a Class D felony.

Iowa

IOWA CODE § 49.107(1) (1990)

The following acts, except as specially authorized by law, are prohibited on any election day:

1. Loitering, congregating, electioneering, posting of signs, treating voters or soliciting votes, during the receiving of the ballots, either on the premises of any polling place or within 300 feet of any outside door of any building affording access to any room where the polls are held, or of any outside door of any building affording access to any hallway, corridor, stairway or other means of reaching the room where the polls are held, except this subsection shall not apply to posting of signs on private property not a polling place.

Kansas

KAN. STAT. ANN. § 25-2413(E)(1) (1986)

Disorderly election conduct is willfully:

(e) Engaging in any of the following activities within 25 feet from entrance of polling place during the hours the polls are open on election day: (1) soliciting of contributions.

Kentucky

KY REV. STAT. ANN. § 117-235(3) (1990 Supp)

No person shall do any electioneering at the polling place or within a distance of five hundred (500) feet of any entrance to a building in which a voting machine is

located if that entrance is unlocke and is used by voters on election day, unless the fiscal court or legislative body of an urban-county government specifically authorizes by ordinance on a county-wide basis a greater distance for the polling place within which electioneering may be permitted, but in no case shall electioneering be allowed within five hundred (500) feet of any entrance to a building in which a voting machine is located if that entrance is unlocked and if used by voters. Electioneering shall include the displaying of signs, the distribution of campaign literature, cards or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any candidate or question on the ballot in any manner, but shall not include exit polling. Nothing contained in this section shall prohibit electioneering conducted within a private residence or establishment other than that in which the polling place is located by persons having an ownership interest in such property.

Louisiana

LA. REV. STAT. ANN. § 18:1462 (1990)

Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m., to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place begin [sic] used in an election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

Maine

ME. REV. STAT. ANN. tit. 21A, § 682(3) (1990)

No person may display any advertising material or operate any advertising medium, including a sound amplification device, intended to influence the opinion of any voter, within 250 feet of the entrance to either the voting place or the registrar's office. The term "sound amplification device" include, but is not limited to, sound trucks [sic], loudspeakers and blowhorns.

A. This subsection does not apply to advertising material on automobiles traveling to and from the voting

place. It does not prohibit a person from passing out stickers at the voting place which are to be pasted on the ballot at a primary election. It does not prohibit a person, other than an election official, from wearing a campaign button when the longest dimension of the button does not exceed 3 inches.

Maryland

MD. ELEC. ANN. CODE art. 33 § 24-23(a)(4)(i) (1990)

(a) The following offenses shall be punished as in this section provided. For any person:

(4)(i) to canvass, electioneer or post any campaign material in the polling place or beyond a line established by signs posted in accordance with this paragraph. At each polling place, 2 election judges, 1 from each principal political party, shall be designated by the election board and, acting jointly, shall post signs outlining a line around the entrance and exit of the building closest to that part of the building in which voting occurs. The line shall be located as near as practicable to 100 feet from the entrance and exit and shall be established after consideration of the configuration of the entrance and the effect of placement on public safety and the flow of pedestrian and vehicular traffic. The signs shall contain the following or comparable language: "No Electioneering Beyond this Point."

Massachusetts

MASS. GEN. L. ch 54 § 65 (1990)

At an election of state or city officers, and of town officers in towns where official ballots are used, the

presiding election officer at each polling place shall, before the opening of the polls, post at least three cards of instruction, three cards containing abstracts of the laws imposing penalties upon voters, and a[t] least three specimen ballots within the polling place outside the guard rail, and have available at the check in area at state elections a number of copies of the information for voters material provided for in section fifty-four at least one for every one hundred voters; and no other poster, card, handbill, placard, picture or circular intended to influence the action of the voter shall be posted, exhibited, circulated or distributed in the polling place, in the building where the polling place is located, on the walls thereof, on the premises on which the building stands, or within one hundred and fifty feet of the building entrance door to such polling place.

Michigan

MICH. COMP. LAWS § 168.744 (1989 Supp.)

It shall be unlawful for any person to place or distribute stickers, other than stickers provided by the election officials pursuant to law, in the polling room or any compartment therewith connected or within 100 feet from any entrance to the building in which said polling place is located.

It shall be unlawful for any person to solicit donations, gifts, contributions, purchase of tickets or similar demands, or to request or obtain signatures on petitions in the polling room or any compartment therewith connected or within 100 feet from any entrance to the building in which the polling place is located.

Minnesota

MINN. STAT. § 204C.06(1) (1990 Supp)

No one except an election official or an individual who is waiting to register to vote shall congregate in any manner or stand within 100 feet of the entrance to a polling place.

Mississippi

MISS. CODE ANN. § 23-15-895 (1990)

It shall be unlawful for any candidate for an elective office or any representative of such candidate to post or distribute cards, posters or other campaign literature within one hundred fifty (150) feet of any entrance of the building wherein any election is being held. It shall be unlawful for any candidate or a representative named by him in writing, to appear at any polling place while armed or uniformed, nor shall he display any badge or credentials except as may be issued by the manager of the polling place.

Missouri

MO. REV. STAT. § 115.647(18) (1990 Supp)

Class 4 Election offenses/misdemeanors

Exit polling, surveying, sampling, electioneering, distributing election literature, posting signs or placing vehicles bearing signs with respect to any candidate or question to be voted on at an election day inside the building in which a polling place is located or within 25 feet of the buildings outer door closest to the polling

place, or, on the part of any person, refusing to remove or permit removal from property owned or controlled by him, any such election sign or literature located within such a district on such day after required for removal by any person.

Montana

MONT. CODE ANN. § 13-35-211 (1990)

(1) No person may do any electioneering on election day within any polling place or any building in which an election is being held or within 200 feet thereof, which aids or promotes the success or defeat of any candidate or ballot issue to be voted upon at the election.

(2) No person may buy, sell, give, wear, or display at or about the polls on an election day any badge, button, or other insignia which is designed or tends to aid or promote the success or defeat of any candidate or ballot issue to be voted upon at the election.

(3) No person within a polling place or any building in which an election is being held may solicit from an elector, before or after he has marked his ballot and returned it to an election judge, information as to whether the elector intends to vote or has voted for or against a candidate or ballot issue.

Nebraska

NEB. REV. STAT. § 32-1221 (1988)

No officer of election shall do any electioneering on election day. No person shall do any electioneering on

election day within any polling place, any building in which an election is being held, or two hundred feet thereof, nor obstruct the doors or entries thereto or prevent free ingress to and from such building. Any election officer, sheriff, or other peace officer shall clear the passageways and prevent such obstruction and shall arrest any person so doing. No person shall conduct any exit poll, public opinion poll, or any other interview with voters on election day seeking to determine voter preference within twenty feet of entrance of any polling place room or, if inside the polling place building, within one hundred feet of any voting booth.

Nevada

NEV. REV. STAT. § 293.740(1) (1990)

It is unlawful inside a polling place:

(a) For any person to solicit a vote or speak to a voter on the subject of marking his ballot.

New Hampshire

N.H. REV. STAT. ANN. § 659.23(II.) (1989 Supp)

No person who is a candidate for office or who is representing or working for a candidate shall distribute any campaign materials or perform any electioneering activities or any activity which affects the safety, welfare and rights of voters within a corridor 10 feet wide and extending a distance from the entrance door of the building as determined by the moderator where the election is being held.

New Jersey

N.J. REV. STAT. § 19:34-6 (1989)

If a person shall on election day tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be guilty of a misdemeanor and shall be punished by a fine not exceeding $500 or by imprisonment not exceeding 1 year or both.

New Mexico

N. M. STAT. ANN. § 1-20-16 (1985)

Electioneering too close to the polling place consists of any form of campaigning on election day within 100 feet of the building in which the polling place is located, and includes the display of signs or distribution of campaign literature.

New York

N.Y. ELEC. LAW § 17-130(4) (1978)

Any person who:

4. Electioneers on election day or on days of registration within one hundred feet, as defined herein, from a polling place. Said prohibition shall not appiy to a building or room that has been maintained for political purposes at least six months prior to said election or registration days, except that no political displays, placards or posters shall be exhibited therefrom. For the purposes of this section, the one hundred feet distance

shall be deemed to include a one hundred foot radial measured from the entrances, designated by the inspectors of elections, to a building where the election or registration is being held.

North Carolina

N.C. GEN. STAT. § 163.147 (1990)

No person or group of persons shall, while the polls are open at the voting place on the day of the primary or election, loiter about, congregate, distribute campaign material, or do any electioneering within the voting place, or within 50 feet in any direction of the entrance or entrances to the building in which the voting place is located. Notwithstanding the above provision, if the voting place is located in a large building, the registrar and judges of the precinct may designate the entrance to the voting place within said building and none of the above activity shall be permitted within 50 feet of said entrance or entrances of said voting place. This section shall not, however, prohibit any candidate for nomination or election from visiting such voting place in person, provided he does not enter the voting enclosure except to cast his vote as a registered voter in said precinct. The county boards of elections and precinct registrars shall have full authority to enforce the provisions of this section.

North Dakota

N.D. CENT. CODE § 16.1-10-03, -06, -06.2 (1990)

16.1-10-03. Political badge, button, or insignia at elections. No person shall, on the day of an election, buy, sell,

give, or provide any political badge, button, or any insignia to be worn at or about the polls on that day. No such political badge, button, or insignia shall be worn at or about the polls on any election day.

16.1-10-06. Electioneering on election day – Penalty. Any person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people, shall be guilty of an infraction. The display upon motor vehicles of adhesive signs which are not readily removable and which promote the candidacy of any individual, any political party, or a vote upon any measure, and political advertisements promoting the candidacy of any individual, political party, or a vote upon any measure which are displayed on fixed permanent billboards, shall not, however, be deemed a violation on this section.

16.1-10-06.2. Sale or distribution at polling place. No person may approach a person attempting to enter a polling place, or who is in a polling place, for the purpose of selling, soliciting for sale, advertising for sale, or distributing any merchandise, product, literature, or service. This prohibition applies in any polling place or within one hundred feet [30.48 meters] from any entrance leading into a polling place on election day.

Ohio

OHIO REV. CODE ANN. § 3501.30 and 3501.35 (1988)

3501.30 Supplies for polling places. Two or more small flags of the United States approximately fifteen

inches in length along the top shall be provided and shall be placed at a distance of one hundred feet from the polling place on the thoroughfares or walkways leading to the polling place, to mark the distance within which persons other than election officials, witnesses, challengers, police officers, and electors waiting to mark, marking, or casting their ballots shall not loiter, congregate, or engage in any kind of election campaigning. Where small flags cannot reasonably be placed one hundred feet from the polling place, the presiding election judge shall place the flags as near to one hundred feet for the entrance to the polling place as is physically possible. Police officers and all election officials shall see that this prohibition against loitering and congregating is enforced. When the period of time during which the polling place is open for voting expires, all of said flags shall be taken into the polling place, and shall be returned to the board together with all other election materials and supplies required to be delivered to such board.

3501.35. No loitering near polls. During an election and the counting of the ballots, no person shall loiter or congregate within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place; in any manner hinder or delay an elector in reaching or leaving the place fixed for casting his ballot; within such distance give, tender, or exhibit any ballot or ticket to any person other than his own ballot to the judge of election; exhibit any ticket or ballot which he intends to cast; or solicit or in any manner attempt to influence any elector in casting his vote. No person, not an election official,

employee, witness, challenger, or police officer, shall be allowed to enter the polling place during the election, except for the purpose of voting. No more electors shall be allowed to approach the voting shelves at any time than there are voting shelves provided. The judges of election and the police officer shall strictly enforce the observance of this section.

Oklahoma

OK. REV. STAT. tit. 26 § 7-108 (1976)

No person shall be allowed to electioneer within 300 feet of any ballot box while an election is in progress, nor shall any person or persons, except election officials and other persons authorized by law, be allowed within 50 feet of any ballot box while an election is in progress.

Oregon

OR. REV. STAT. § 260.695 (1986)

(2) No person, within any building in which a polling place is located or within 100 feet measured radially from any entrance to the building, shall do any electioneering, including circulating any cards or handbills, or soliciting signatures to any petition. No person shall do any electioneering by public address system located more than 100 feet from an entrance to the building but capable of being understood within 100 feet of the building. The electioneering need not relate to the election being conducted.

Pennsylvania

PA. STAT. ANN. tit. 25 § 3060(c) (1963)

No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up with said room except as required by this Act.

Rhode Island

R.I. GEN. LAWS § 17-19-49 (1988)

No poster, paper, circular, or other document designed or tending to aid, injure, or defeat any candidate for public office or any political party on any question submitted to the voters shall be distributed or displayed within the voting place or within fifty (50) feet of the entrance or entrances to the building in which voting is conducted at any primary or election. Neither shall any election official display on his or her person within the voting place any political party button, badge, or other device tending to aid, injure, or defeat the candidacy of any person for public office or any question submitted to the voters or to intimidate or influence the voters.

South Carolina

S.C. CODE ANN. § 7-25-180 (Law. Co-op. 1977)

It shall be unlawful on any election day within two hundred feet of the building wherein a polling place is located for any person to distribute any type of campaign literature or place any political posters. The poll manager

shall use every reasonable means to keep the area within two hundred feet of the polling place clear of political literature and displays, and the county and municipal law enforcement officer shall, upon request of a poll manager, remove or cause to be removed any material within two hundred feet of a polling place distributed or displayed in violation of this section.

South Dakota

S.D. CODIFIED LAWS ANN. § 12-18-3 (1990)

Except for sample ballots and materials and supplies necessary for the conduct of the election, no person may, in any polling place or within or on any building in which a polling place is located or within one hundred feet from any entrance leading into a polling place, maintain an office or communications center or public address system or display campaign posters, signs or other campaign materials or by any like means solicit any votes for or against any person or political party or position on a question submitted. No person may engage in any practice which interferes with the voter's free access to the polls or disrupts the administration of the polling place, or conduct, on the day of an election, any exit poll or public opinion poll with voters within one hundred feet of a polling place.

Texas

TEX. ELEC. CODE ANN. § 61.003 (Vernon 1986)

(a) A person commits an offense if, during the voting period and within 100 feet of an outside door through

which a voter may enter the building in which a polling place is located, the person:

(1) loiters; or

(2) Electioneers for or against any candidate, measure, or political party.

(b) In this section, "voting period" means the period beginning when the polls open for voting and ending when the polls close or the last voter has voted, whichever is later.

Utah

UTAH CODE ANN. § 20-13-17 (1990 Supp)

(1) On the day of any primary, general, municipal, bond, or special election, within a polling place or in any public area within 150 feet of the building where a polling place is located, no person may:

(a) do any electioneering

(b) circulate cards or handbills of any kind;

(c) solicit signatures to any kind of petition; or

(d) engage in any practice that interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place.

Vermont

VT. STAT. ANN. tit. 17 § 2508(a) (1990 Supp)

The presiding officer shall insure during polling hours that:

(1) Within the building containing a polling place, no campaign literature, stickers, buttons, name stamps, information on write-in candidates or other political materials are displayed, placed, handed out or allowed to remain; and

(2) Within the building containing a polling place, no candidate, election official or other person distributes election materials, solicits voters, or otherwise campaigns; and

(3) On the walks and driveways leading to a building in which a polling place is located, no candidate or other person may physically interfere with the progress of a voter to and from the polling place.

Virginia

VA. CODE ANN. § 24.1-101 (1985)

During the receiving and counting of the ballots, it shall be unlawful for any person to loiter or congregate within forty feet of any entrance of any polling place; in any manner to hinder or delay a qualified voter in reaching or leaving a polling place; within such distance to give, tender, or exhibit any ballot, ticket or other campaign material to any person or to solicit or in any manner attempt to influence any person in casting his vote.

Washington

WASH. REV. CODE § 29.51.020 (1985)

(1) On the day of any primary, general or special election, no person may, within a polling place, or in any

public area within three hundred feet of any entrance to such polling place:

(a) Do any electioneering;

(b) Circulate cards or handbills of any kind;

(c) Solicit signatures to any kind of petition;

(d) Engage in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place; or

(e) Conduct any exit poll or public opinion poll with voters.

This statute was declared unconstitutional in *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988).

West Virginia

W. VA. CODE § 3-1-37 (1990)

No person, except the election officers and voters while going to the election room to vote and returning therefrom, may be or remain within three hundred feet of the outside entrance to the building housing the polling place while the polls are open; but this section does not apply to persons living or carrying on business-within that distance of the election room, while in the discharge of their legitimate business, or to persons whose business requires them to pass and repass within three hundred feet of such entrance.

Wisconsin

WIS. STAT. § 12.03 (1986)

(2) No person may engage in electioneering during polling hours on election day within 500 feet of an entrance to a building containing a polling place.

Wyoming

WYO. STAT. § 22-26-113 (1977)

Electioneering too close to a polling place consists of any form of campaigning on election day within one hundred (100) yards of the building in which the polling place is located, and includes also the display of signs or distributions of campaign literature.

(2)

No. 90-1056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CHARLES W. BURSON, Attorney General
and Reporter for the STATE OF TENNESSEE,
Petitioner,

vs.

REBECCA FREEMAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 25, 1991

QUESTION PRESENTED

Does the First Amendment permit a state to prohibit the display and distribution of campaign materials and the solicitation of votes within 100 feet of the entrance to polling places, while permitting non-political messages to be communicated at those locations?

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CHARLES W. BURSON, Attorney General
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STATEMENT OF THE CASE

This case involves a challenge to a Tennessee statute which expressly prohibits speech related to elections within 100 feet of the entrance to a polling place, while allowing all other kinds of speech within that area, including commercial speech and the solicitation of funds. Because the Tennessee Supreme Court correctly ruled that the statute created an impermissible content-based discrimination that violated the First Amendment, the petition should be denied.

This action was filed in the Chancery Court for the State of Tennessee at Nashville on July 27, 1987. Respondent

sought declaratory and injunctive relief against Tennessee Code Annotated § 2-7-111, which prohibits certain speech and conduct at polling places, and T.C.A. § 2-19-119, which fixes criminal penalties for violation of § 2-7-111, on the ground that they violate the First and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 19 and Article XI, § 8 of the Constitution of the State of Tennessee. The offending portion of T.C.A. § 2-7-111, subsection (b), specifically applies only to "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question . . .." Petition ("Pet.") at 6. No other speech is affected, nor is any other conduct, including the solicitation of funds for any non-political purposes, such as charitable, religious, or even commercial.

The prohibition applies within an area of "one hundred feet (100') from the entrances to the building in which the election is to be held..." subsection (a), Pet. at 5, and there is also a ban on "campaign posters, signs or other campaign literature . . . on or in any building or on the grounds of any building in which a polling place is located." Subsection (b), Pet. at 6. As a result, if an entrance is close to a street or sidewalk, the ban can extend well beyond the property lines of the polling places. On the other hand, if "the grounds" of the polling place are large, as they might be for a high school, the prohibition on displays can extend well beyond one hundred feet.[1]

Trial was held on October 24, 1988, before the Chancery

[1] In twelve of Tennessee's ninety-five counties, the boundary extends to three hundred feet. T.C.A. § 2-7-111(a), Pet. at 6. Petitioner Attorney General has opined that this distinction is unconstitutional according to Article XI, § 8 of the Tennessee Constitution. Addendum pp. 1a-5a.

Court, Twentieth Judicial District, Davidson County. Respondent, a longtime local political party activist, testified that personal solicitation and other polling place campaigning are especially important in district-specific political races. She testified that the 100-foot ban on personal solicitation and on the display and distribution of campaign materials has limited her ability to communicate with voters. Pet. App. 8a. Proof at trial also showed that in some instances the challenged 100-foot boundary extends onto sidewalks and streets adjacent to polling places.

The State failed to show that the display or distribution of campaign materials or the solicitation of votes near polling places has a different effect from the communication of other messages at polling places. *Id.* 14a. To the contrary, the State's witness, Davidson County Registrar, Constance Ann Alexander, testified that persons soliciting for charitable organizations inside the 100-foot boundary would pose the same kind of problem as persons soliciting votes inside that boundary. *Ibid.* The sole justification offered by the State for these restrictions was to prevent "interference with voting, confusion and overcrowding at the polling places and mistakes by election officials." Pet. App. 4a-5a.

In a Memorandum Opinion filed April 26, 1989, the Chancellor upheld the challenged statutes as a content-neutral time, place, and manner restriction. *Id.* 5a. Respondent then appealed as of right to the Supreme Court of Tennessee, which, by a vote of 4-1, reversed the trial court and declared the challenged statutes to be violative of the First Amendment, thereby making it unnecessary to decide the case under the Tennessee Constitution.

The opinion makes clear that its holding was based on the fact, admitted by the State, that "the statute on its face criminalizes only political speech and political activity. . .." Pet. App. 12a. It then rejected the claim that the statute was merely a reasonable time, place, and manner restriction, on

the theory that it is viewpoint neutral, even though content-based, distinguishing this case from the exclusionary zoning cases for businesses purveying sexual material, relied on by petitioner here and in the courts below. *Id.* at 12a-13a. The court also found that statute suppressed only certain speech and that the State failed to show that the prohibited speech "has a different effect from that of the communication of other messages at polling places." *Id.* at 14a.

Equally important to the court's decision was its rejection of the justification for the statute -- "the prevention of interference with voting, confusion, mistakes, and overcrowding at polling places" (*id.*) -- in light of its effect. It acknowledged that states have such an interest, finding it to be "compelling . . . *within the polling place itself.*" *Id.* at 15a, emphasis in original. But it found that T.C.A. § 2-7-111 was "not narrowly tailored to advance the State's interest" because of the lengthy 100 foot arc from all of the building's entrances and because the State's testimony "concerned the numbers of persons present in the polling place itself, not the numbers of persons outside the polls." *Id.* It also made clear that other, less restrictive statutes might well pass constitutional muster, citing one court's approval of 25 foot boundary, but observing that such "carefully drafted" provisions were not before the court. *Id.* at 18a.

REASONS FOR DENYING THE PETITION

1. The principal basis on which review is sought is that the decision of the Tennessee Supreme Court is inconsistent with the decisions of this Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *Boos v. Barry*, 485 U.S. 312 (1988), *Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746 (1989), and *United States v. Kokinda*, ___ U.S. ___, 110 S.Ct. 3115 (1990). According to petitioner, those cases make clear that the determination that TCA § 2-7-111 is not content-neutral is in error. For the reasons set forth below, those decisions do not support the Attorney General's position.

To begin with, the statute invalidated by the Tennessee Supreme Court, like the District of Columbia regulation invalidated by this Court in *Boos v. Barry*, *supra*, directly burdens persons who communicate explicitly political messages, while speakers of other messages are left unaffected. Here, like *Boos*, "the government has determined that an entire category of speech . . . is not to be permitted." 485 U.S. at 319. Even a regulation that "'does not favor either side of a political controversy'" may be impermissibly content-based where it prohibits public discussion of an entire topic. *Id.*, *quoting Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980). As the Tennessee Supreme Court correctly noted, T.C.A. § 2-7-111 "is content-based because it regulates a specific subject matter, the solicitation of votes and the display or distribution of campaign materials, and a certain category of speakers, campaign workers." Pet. App. 14a. Under T.C.A. §§ 2-7-111, a person who stands ninety feet from the entrance to a polling place exhorting people "Vote Republican" is subject to criminal prosecution, while another person standing the same distance from the entrance chanting "Hare Krishna" or a person in that location soliciting charitable donations is not; the sole distinction is the content of the message.

Petitioner attempts to justify this disparate treatment based upon the so-called "secondary effects" doctrine previously applied by this Court to uphold restrictive zoning of adult film outlets. Pet. at 9-11. *City of Renton v. Playtime Theatres, Inc.*, *supra*; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). But *Young*, *Renton*, and their progeny make it clear that, in order for the secondary effects doctrine to apply, the government must show that the impact of these businesses on the surrounding area is different from that of businesses not dealing primarily in the subject materials.

Thus, the court of appeals in *Renton* found that the City Council made detailed legislative findings to this effect, *see*, *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 530-31, n.3 (9th Cir. 1984), as did the Detroit Common Council in *Young*, *supra*, 427 U.S. at 54-56, n.6 (plurality opinion), and *id.* at 81, n.4 (Powell, J., concurring).

In order for the secondary effects doctrine to apply, the government must show a factual basis sufficient to conclude that the restriction was enacted for the purpose of preventing urban blight. *Christy v. City of Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987); *CLR Corp. v. Henline*, 702 F.2d 637, 639 (6th Cir. 1983). Thus here, the State would have had to show that the Tennessee legislators believed that engaging in political speech near the entrance to property to be used as a polling location two to four times in some years was likely to blight a neighborhood, increase crime, or devalue surrounding properties. But the Tennessee General Assembly enacted T.C.A. §§ 2-7-111 and 2-19-119 as part of an omnibus election bill (Tenn. Public Acts 1972, ch. 740), and there is no evidence that the General Assembly gave the slightest consideration to any "secondary effects" of soliciting votes near the entrance of a polling place, let alone that those effects were substantially different from those arising from the distribution of commercial handbills, religious tracts, or other printed materials which the law specifically allows.

Moreover, the proof adduced at trial belies any suggestion that the "secondary effects" doctrine applies here. Indeed, petitioner's only witness acknowledged that, if there were persons soliciting for charitable organizations inside the 100-foot boundary, they would pose the same kind of problems as persons soliciting votes inside that boundary. *See* Pet. App. 14a. That witness also suggested that the State's real concern with the solicitation of votes was *inside* the polling place which appears to be the direct opposite of the secondary effects relied on in *Renton*.

Petitioner places perhaps his greatest reliance on *United States v. Kokinda*, ___ U.S. ___, 110 S.Ct. 3115 (1990), where this Court upheld a federal regulation banning solicitation of funds on postal property, including a public sidewalk. He suggests that polling places and the surrounding streets and sidewalks are analogous to the sidewalk in *Kokinda*. Despite the fact that both bans include sidewalks, there are a number of important distinctions that make *Kokinda* plainly inapposite.

First, *Kokinda* involved the solicitation of money, which the Court concluded could have a serious disruptive effect on the flow of traffic into the post office. Here, by contrast, the ban applies to pure speech, and there is no claim by the State of *any* obstruction to traffic.

Second, the State of Tennessee does not own the polling place grounds, which in many cases are located on private property such as churches or private educational institutions. The State makes only limited, temporary use of such properties; other public or private activities are often conducted on the same properties at the same time as elections. By contrast, the federal government owned and controlled the post office properties at issue in *Kokinda*. *See* 110 S.Ct. at 3119. The Court there also noted that the post office had not dedicated its sidewalks to any expressive activity, *id.* at 3121, whereas polling places are by definition dedicated to expressive activity.

Furthermore, as the Tennessee Supreme Court noted, in some instances the 100-foot boundary extends onto sidewalks and streets adjacent to the polling places. Pet. App. 8a. Public streets and sidewalks are "traditional public fora that `time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions.'" *Boos v. Barry*, *supra*, 485 U.S. at 318, *quoting Hague v. CIO*, 307 U.S. 496, 515 (1939). These fora "occupy a 'special position in terms of First Amendment

protection[.]'" *Id.*, *quoting United States v. Grace*, 461 U.S. 171, 180 (1983). For all of these reasons, petitioner's flawed analogy to the non-public sidewalk from the post office parking lot to the building in *Kokinda* does not support his argument here.

Finally, *Ward v. Rock Against Racism*, *supra*, offers no solace for petitioner either. There this Court upheld a regulation aimed at limiting the level of sound coming from concerts in Central Park, not because the city disapproved of the music, or preferred another kind, but because excessive volume of any kind disturbed those nearby. Not only is *Ward* inapplicable here because the goals of the two regulations are so different, but *Ward* dealt with conduct that dampens all speech, while T.C.A. § 2-7-111 applies only to political speech where "the importance of First Amendment protections is 'at its zenith.'" *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

Even if the time, place, and manner test did apply, T.C.A. § 2-7-111 could not be upheld, as the court below made clear. An essential element of that test, curiously omitted from petitioner's recitation of it (Pet. at 8), is that the challenged regulation is "narrowly tailored to serve a significant government interest." *United States v. Grace*, *supra*, 461 U.S. at 177. The Tennessee Supreme Court correctly found that T.C.A. § 2-7-111 is not narrowly tailored to advance this interest:

> The statute at issue prohibits all campaign activity from an arc of 100 feet from *every* entrance to the polling places. In many instances this arc extends onto public streets and sidewalks. The State has not shown a compelling interest in the 100-foot radius. The specific testimony of the State's witness about confusion, error, overcrowding, etc. concerned the numbers of persons present in the polling place itself, not the numbers of persons outside the polls.

Pet. App. 15a (emphasis in original).

Since the *only* justification offered by the Attorney General for the 100-foot boundary around polling places is the prevention of interference with voting, confusion, mistakes, and overcrowding *inside* the polling places, it is obvious that the restrictions *outside* the polling place are hardly the kind of "narrowly tailored" rules required even under the time, place, and manner test.[2]

2. There is also no conflict among the lower courts for this Court to resolve. At least two United States Courts of Appeals have held that statutes limiting communications with voters at polling places violate the First Amendment. In *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988), the court invalidated a statute prohibiting exit polling within 300 feet of polling places on the ground that the statute was content-based and not narrowly tailored. Similarly, in *Clean-up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985), the court invalidated as overbroad a Florida statute which prohibited the solicitation of any vote, opinion, contribution, or signature on a petition within 100 yards of a polling place on election day. *See also Firestone v. News-Press Publishing Co., Inc.*, 538 So.2d 457 (Fla. 1989) (statute prohibiting persons who are not in line to vote from coming within 50 feet of the polling place, upheld only insofar as it pertained to persons

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[2] In that regard we note that several Tennessee statutes address disruptive conduct at polling places without burdening political speech. T.C.A. § 2-19-101 prohibits interfering with a nominating meeting or election. T.C.A. § 2-19-103 prohibits preventing any person's performance of duties or exercise of rights under the election code. T.C.A. § 2-19-115 prohibits violence and intimidation to prevent voting. The Supreme Court of Tennessee opined that two of these statutes adequately prohibit voter interference and intimidation. Pet. App. 17a.

within a polling room, but set aside as to restrictions outside the polling place).

While petitioner points out that scores of states have statutes restricting election day activity, he cites no decision in which a prohibition of a particular message at a polling place has been upheld against a First Amendment attack. Moreover, the instant decision is confined to the borders of one State; it will not have the national impact predicted by the Attorney General, nor even that of a decision of a federal court of appeals. The existence of similar statutes in other States may some day yield a decision contrary to that of the Tennessee Supreme Court; however, all previous decisions known to counsel are in accord with respondent's position. Until a conflict in the decisions of State courts and United States Courts of Appeals occurs, review by this Court is premature. Indeed, the fact that every state has some type of regulation regarding activities in and outside of polling places on election day, Pet. at 15, makes the case for review here even less compelling: if petitioner is correct in his legal analysis, surely some court of appeals or state supreme court will agree. But, until one does, there is no basis for this Court to consider the issue.

3. Because respondent based her claim on both the U.S. and Tennessee Constitutions, a decision by this Court will not be the final word in this case. *Assuming arguendo* a reversal by this Court, the Supreme Court of Tennessee would then have to consider whether the challenged statutes violate Article I, § 19 of the Tennessee Constitution. There is a strong likelihood, based upon that court's interpretation of the Tennessee Constitution, that it would again rule in respondent's favor as a matter of state law.

The Supreme Court of Tennessee has previously opined that the provisions of Article I, § 19 assuring protection of free speech and press should be construed to have a scope at least as broad as that afforded those freedoms by the First Amend-

ment, and that that Court, as final arbiter of the interpretation of Article I, § 19, may expand the protection afforded a citizen's exercise of such liberties. *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn. 1979). It follows that what the Supreme Court of Tennessee regards as violating the free speech and press guarantees of the federal First Amendment, it *a fortiori* regards as violating Article I, § 19 of the Tennessee Constitution.[3]

The Supreme Court of Tennessee has previously given short shrift to a municipal ordinance which made a constitutionally impermissible distinction between distribution of handbills bearing a commercial message and distribution of handbills bearing political or religious messages. *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444 (Tenn. 1979). The court specifically rejected an attempt to apply the time, place, and manner test there because the law distinguished between political messages and commercial messages. That difference rendered the ordinance impermissibly content-based, under both the First Amendment and Article I, § 19 of the Tennessee Constitution. *Id.* at 452-453. There

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[3] Article I, § 19 of the Tennessee Constitution provides:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court as in other criminal cases.

is no reason to believe that that court would reach a contrary conclusion as to the electoral statutes here which it has already found to violate the First Amendment. Therefore, review by this Court would likely result in an advisory opinion, with no practical significance.

CONCLUSION

Because petitioner has failed to show any basis for this Court to review the well-reasoned decision of the Supreme Court of Tennessee, the petition should be denied.

Respectfully submitted,
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March 25, 1991

ADDENDUM

State of Tennessee

OFFICE OF THE ATTORNEY GENERAL
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DECEMBER 3, 1987

OPINION NO. 87-185

The Three Hundred Foot (300') Election Boundary

QUESTION

Does Chapter No. 362 of the Public Acts of 1987 violate the Tennessee Constitution?

OPINION

Absent a rational basis for the provision being applicable only to particular counties by reference to the federal census, it is the opinion of this office that Chapter 362 of the Public Acts of 1987 violates Article XI, §8 of the Tennessee Constitution.

ANALYSIS

T.C.A. § 2-7-111 pertains to the arrangement of, and restrictions at, polling places. It originally provided for a one hundred foot election boundary which was applicable state-wide. Section 1 of Chapter No. 361 of the Public Acts of 1987

amended T.C.A. § 2-7-111(a) by adding the following:

> Provided, however, in any county having a population of:
>
> | Not Less Than | Nor More Than |
> |---|---|
> | 13,600 | 13,610 |
> | 16,350 | 16,450 |
> | 24,590 | 24,600 |
> | 28,500 | 28,560 |
> | 41,800 | 41,900 |
> | 50,175 | 50,275 |
> | 54,375 | 54,475 |
> | 56,000 | 56,100 |
> | 67,500 | 67,600 |
> | 77,700 | 77,800 |
> | 85,725 | 85,825 |
>
> all according to the 1980 federal census or any subsequent federal census, the officer shall measure off three hundred feet (300') from the entrances to the building in which the election is to be held and place boundary signs at that distance.

Within this three hundred foot boundary "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited." T.C.A. § 2-7-11(b). A violation of the provisions of this section is a misdemeanor. *See* T.C.A. §2-19-119.

Counties with population within the specified population ranges are governed by the three hundred foot boundary provision. This provision is applicable to the following counties according to the 1980 federal census: Bradley, Blount, Carter, Greene, Loudon, McMinn, Monroe, Polk, Sumner, Unicoi, and Wilson. All other counties are governed by the one hundred foot election boundary.

Article XI, Section 8 of the Constitution of Tennessee states in part:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; no to pass any law granting to any individual or individuals, rights, privileges, immunitie [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

Article XI Section 8 does not prohibit classifications but only prohibits unreasonable and arbitrary classifications. *LaFever v. Ware*, 211 Tenn. 393, 365 S.W.2d 44 (1963).

In *Harwell v. Leech*, 672 S.W.2d 761, the Supreme Court of Tennessee, in considering whether a reasonable basis for a special classification existed, reiterated the following principles:

> It is not necessary that the reasons for the classification appear in the face of the legislation. If any possible reason can be conceived to justify the classification, it will be upheld and deemed reasonable. So long as the statute applies equally and consistently to all persons who are or may come into the like situation or circumstance, it is not objectionable as being based upon an unreasonable classification. There is no general rule by which to distinguish a

> reasonable from an unreasonable classification, the question being a practical one varying with the facts in each case. Where the reasonableness of the classification is fairly debatable the courts will uphold the classification. [citations omitted].

Id. at 763. Thus, a determination of whether the statutory classification bears a reasonable relation to the subject sought to be achieved is necessary before the classification will be upheld as reasonable.

A review of the legislative history reveals that Public Chapter No. 362 originated as House Bill No. 384 introduced on behalf of Bradley County. It appears that a measure which would extend the election boundary from one hundred feet (100') to three hundred feet (300') was put to a referendum vote by the citizens of Bradley County. The measure passed by 84%. When it was discovered that the election boundary could not be extended by referendum, House Bill No. 384 was introduced. No justification was given for the bill except that the voters in Bradley County passed an identical measure by 84%. The bill was subsequently amended to include other counties and after submission to a conference committee Public Chapter 362 achieved its present form.

Applying the principles of *Harwell* to this situation it appears that there is not a rational basis for this provision being applicable only to particular counties. There are no readily identifiable differences between the counties which come under Public Chapter 362 and the counties to which it does not apply which would justify the distinction. Nor is there any discernable reason why an extension of the boundary to three hundred feet is necessary in the affected counties. Consequently, the classification embodied in Public Chapter 362 is arbitrary and unreasonable. In light of these facts and the applicable principles, it is the opinion of this office that Public Chapter 362 violates Article XI, § 8 of the Tennessee

Constitution.

/s/
W. J. MICHAEL CODY
Attorney General and Reporter

/s/
JOHN KNOX WALKUP
Chief Deputy Attorney General

/s/
MARK A HUDSON
Assistant Attorney General

Requested by:

Mr. Jack A. Long
State Representative
House of Representatives
Suite 106, War Memorial Building
Nashville, Tennessee 37219

(3)

No. 90-1056

In The

Supreme Court of the United States

October Term, 1990

CHARLES W. BURSON, Attorney General and Reporter for the STATE OF TENNESSEE,

Petitioner,

v.

REBECCA FREEMAN,

Respondent.

On Writ Of Certiorari To The Tennessee Supreme Court

JOINT APPENDIX

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Petition For Certiorari Filed On December 28, 1990
Certiorari Granted On April 15, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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* The following documents are contained in the Appendix of the Petition for Writ of Certiorari and not reproduced in this Joint Appendix: Memorandum of the trial court entered on April 26, 1989 and Opinion of the Tennessee Supreme Court filed on October 1, 1990.

CHRONOLOGICAL LIST OF DATES ON WHICH RELEVANT PLEADINGS WERE FILED

ITEM	DATE
Complaint filed	07/28/87
Answer of Defendant Metropolitan Nashville Davidson County filed	07/29/87
Answer of Defendant W. J. Michael Code filed	09/02/87
Order dismissing Metropolitan Nashville Davidson County entered	07/20/88
Trial on merits	10/24/88
Memorandum of trial court filed	04/26/89
Final order of trial court filed	05/05/89
Notice of appeal filed	05/18/89
Tennessee Supreme Court decision entered	10/01/90

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

MARY REBECCA FREEMAN, for herself and all others similarly situated,

Plaintiff,

VS.

W. J. MICHAEL CODY, in his capacity as ATTORNEY GENERAL and REPORTER for the STATE OF TENNESSEE, DAVIDSON COUNTY ELECTION COMMISSION and METROPOLITAN GOVERNMENT OF NASHVILLE/DAVIDSON COUNTY, TENNESSEE,

Defendants.

No. 87-1763-I

Filed
Jul 28 1987

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

Comes the Plaintiff, MARY REBECCA FREEMAN, by and through her attorney, Arnold Peebles, Jr., pursuant to Rules 57 and 65 of the Tennessee Rules of Civil Procedure, and sues the Defendants for Declaratory Judgment and Injunctive relief. For cause of action she would show as follows:

I. PARTIES AND JURISDICTION

1. This Court has jurisdiction over the subject matter of this cause according to Tennessee Code Annotated §§ 17-1-204 and 29-14-101 *et seq.*

2. The Plaintiff, MARY REBECCA FREEMAN, is a resident and citizen of Nashville, Davidson County, Tennessee. She is an attorney licensed to practice by the State of Tennessee. She is Treasurer for the Committee to Elect Tom Watson, the principal campaign committee for a candidate for the Metropolitan Council of Nashville/Davidson County, Tennessee from the seventh councilmanic district. She is a six-term member of the Davidson County Democratic Executive Committee, having been chosen for such office by popular election in Democratic Party primary elections in 1976, 1978, 1980, 1982, 1984 and 1986. She has a present intention to vote in the municipal elections for Metropolitan Nashville/Davidson County on August 6, 1987. She has a present intention to distribute circulars or handbills advocating the election of Tom Watson as a member of the Metropolitan Council at one or more polling places in Nashville, Davidson County, Tennessee on August 6, 1987. She has a present intention to run as a candidate for re-election to the Davidson County Democratic Executive Committee in the Democratic primary election expected to be held in March of 1988.

3. The Defendant, W. J. MICHAEL CODY, is, on information and belief, a resident and citizen of Nashville, Davidson County, Tennessee. He is employed as Attorney General and Reporter for the State of Tennessee. He is sued in his official capacity only.

4. The Defendant, DAVIDSON COUNTY ELECTION COMMISSION, is a governmental body established and constituted according to T.C.A. § 2-12-101 *et seq.* It is responsible for conducting elections in Metropolitan

Nashville/Davidson County and for the administration and implementation of applicable election laws therein.

5. The Defendant, METROPOLITAN GOVERNMENT OF NASHVILLE/DAVIDSON COUNTY, TENNESSEE, is a municipal corporation with its principal place of business located in Nashville, Davidson County, Tennessee. Agents and/or employees of the Defendant Metropolitan Government are principally responsible for the operational enforcement of penal statutes in Nashville, Davidson County, Tennessee, including but not limited to such election laws as carry penalties for violations thereof.

II. FACTS

6. The Plaintiff, Mary Rebecca Freeman, has for substantially all of her adult life been actively involved in political campaigns on behalf of diverse candidates for public office, including numerous campaigns in Nashville, Davidson County, Tennessee. Ms. Freeman avers that she has observed that candidates for public office in Davidson County have historically been permitted to display campaign signs, posters and/or other campaign literature, including but not limited to circulars and/or handbills, on premises where polling places are located provided that no such materials are displayed within one hundred feet (100') of the entrances to such polling places.

7. On or about July 24, 1987, Ms. Freeman discovered that the Defendant Davidson County Election Commission had sent to Tom Watson a copy of Opinion No. 87-59 from the office of the Defendant Mr. Cody, relative

to T.C.A. § 2-7-111(b). Such Opinion Letter is incorporated by reference herein and a copy is attached hereto.

8. Ms. Freeman verily believes that it is the present intention of the Defendant Davidson County Election Commission to direct agents and/or employees of the Defendant Metropolitan Government to prohibit the display of campaign signs, posters and/or other campaign literature on premises where polling places are located, irrespective of the one hundred foot (100') boundary specified in T.C.A. § 2-7-111, in connection with the municipal elections scheduled for August 6, 1987.

9. Tennessee Code Annotated § 2-19-119 purports to impose criminal penalties upon any person who violates T.C.A. § 2-7-111 while boundary signs are posted.

10. Ms. Freeman avers that T.C.A. § 2-7-111 on its face violates the First and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the Constitution of the State of Tennessee in that it seeks to prohibit the dissemination of some, but not all, printed material, such distinction being based solely upon the content of such printed material.

11. Ms. Freeman avers that T.C.A. § 2-7-111(b) is on its face void for vagueness in contravention of the requirements of the First and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Constitution of the State of Tennessee.

12. If T.C.A. § 2-7-111 is enforced as interpreted by the Defendant Mr. Cody, the rights of Ms. Freeman and others similarly situated to read and receive information

relative to the processes of government will be denied or abridged.

13. If T.C.A. § 2-7-111 is enforced as interpreted by the Defendant Mr. Cody, the rights of Ms. Freeman and others similarly situated to disseminate information relative to the processes of government will be denied or abridged.

14. If T.C.A. § 2-7-111 is enforced as interpreted by the Defendant Mr. Cody, Ms. Freeman and others similarly situated will be unreasonably forced to face a real, substantial and imminent threat of criminal prosecution in violation of the United States and Tennessee Constitutions.

15. If the injunctive relief prayed for herein is denied, Ms. Freeman and others similarly situated will suffer immediate and irreparable injury.

III. PRAYER FOR RELIEF

PREMISES CONSIDERED, MARY REBECCA FREEMAN, FOR HERSELF AND FOR ALL OTHERS SIMILARLY SITUATED, PRAYS:

A) That process issue and the Defendants be compelled to appear and answer in this cause.

B) That this Court issue a Declaratory Judgment that T.C.A. § 2-7-111 on its face violates the United States Constitution and the Constitution of the State of Tennessee.

C) That this Court issue a Temporary Injunction prohibiting the Defendants, their agents, servants and/or

employees from interfering with the display of campaign posters, signs and/or other campaign literature on the premises of any polling place in Nashville, Davidson County, Tennessee outside a radius of one hundred feet (100') from the entrances to any such polling place during the pendency of this lawsuit.

D) That this Court issue a Permanent Injunction prohibiting the Defendants, their agents, servants and/or employees from enforcing T.C.A. §§ 2-7-111 and/or 2-19-119.

E) That the costs of this action be taxed jointly and severally to the Defendants in this cause.

F) For such further or general relief as may be proper.

THIS IS THE FIRST APPLICATION

FOR EXTRAORDINARY PROCESS IN THIS CAUSE.

Respectfully submitted,

/s/ Arnold Peebles, Jr.
Arnold Peebles, Jr.

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[Surety and Affidavit omitted in printing]

IN PART II OF THE CHANCERY COURT OF
DAVIDSON COUNTY AT NASHVILLE

MARY REBECCA FREEMAN	)	
	)	NO. 87-1763-I
Vs.	)	
	)	(Chancellor High)
W.J. CODY, ETC., ET AL.	)	

FILED 1987 JUL 29

ANSWER
OF DEFENDANT,
METROPOLITAN GOVERNMENT OF
NASHVILLE/DAVIDSON COUNTY TENNESSEE

Your DEFENDANT, Metropolitan Government of Nashville/Davidson County, Tennessee (correct name is "The Metropolitan Government of Nashville and Davidson County"), for separate Answer to the Complaint, doth respectfully state and show unto this Honorable Chancery Court as follows, to-wit:

1. DEFENDANT admits these averments.

2. DEFENDANT is without knowledge or information sufficient for form a belief as to the truth of whether Plaintiff is the Treasurer for the Committee to Elect Tom Watson, the principal campaign committee for a candidate for the Metropolitan Council of Nashville/Davidson County, Tennessee from the seventh councilmanic district or as to the truth of what Plaintiff's present intentions are. Defendant admits the remaining averments.

3. DEFENDANT admits these averments.

4. DEFENDANT admits these averments.

5. DEFENDANTS admit these averments.

6. DEFENDANT is without knowledge or information sufficient to form a belief as to the truth of these averments.

7. DEFENDANT admits a copy of an Opinion Letter is attached to the Complaint. The Opinion Letter speaks for itself. DEFENDANT is without knowledge or information sufficient to form a belief as to the truth of the remaining averments.

8. TCA, § 2-7-111 speaks for itself. DEFENDANT is without knowledge or information sufficient to form a belief as to the truth of the remaining averments.

9. TCA, §§ 2-19-119 and 2-7-111 speak for themselves.

10. DEFENDANT is without knowledge or information sufficient to form a belief as to the truth of these averments.

11. DEFENDANT is without knowledge or information sufficient to form a belief as to the truth of these averments.

12. DEFENDANT is without knowledge or information sufficient to form a belief as to the truth of these averments.

13. DEFENDANT is without knowledge or information sufficient to form a belief as to the truth of these averments.

14. DEFENDANT is without knowledge or information sufficient to form a belief as to the truth of these averments.

15. DEFENDANT is without knowledge or information sufficient to form a belief as to the truth of these averments.

All averments neither specifically admitted nor denied, are now generally denied, the same as if specifically denied. Wherefore, DEFENDANT prays the equities of this Honorable Chancery Court.

The Department of Law of The Metropolitan Government of Nashville and Davidson County

By /s/ William F. Howard
William F. Howard
Metropolitan Attorney

204 Metropolitan Courthouse
Nashville, Tennessee 37201
(615) 259-6141
Attorneys for DEFENDANT

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
PART I AT NASHVILLE

MARY REBECCA FREEMAN, Plaintiff -vs- W. J. MICHAEL CODY, et al. Defendants	NO: 87-1763-I [CHANCELLOR HIGH BY INTERCHANGE] (Filed SEP 2, 1987)

ANSWER OF W. J. MICHAEL CODY

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1. The defendant would admit the allegations contained in paragraph 1 of the complaint.

2. The defendant has insufficient information to admit or deny the factual allegations contained in paragraph 2 of the complaint and would demand strict proof thereof.

3. The defendant would admit the allegations contained in paragraph 3 of the complaint.

4. The defendant would admit the allegations contained in paragraph 4 of the complaint.

5. The defendant would admit the allegations contained in paragraph 5 of the complaint.

6. The defendant has insufficient information to admit or deny the factual allegations contained in paragraph 6 of the complaint and would demand strict proof thereof.

7. The defendant has insufficient information to admit or deny the factual allegations contained in paragraph 7 of the complaint and would demand strict proof thereof.

8. The defendant has insufficient information to admit or deny the factual allegations contained in paragraph 8 of the complaint and would demand strict proof thereof.

9. The defendant would admit that T.C.A. § 2-19-119 imposes criminal penalties on any person who violates T.C.A. § 2-7-111.

10. The defendant would deny the allegations contained in paragraph 10 of the complaint.

11. The defendant would deny the allegations contained in paragraph 11 of the complaint.

12. The defendant would deny the allegations contained in paragraph 12 of the complaint.

13. The defendant would deny the allegations contained in paragraph 13 of the complaint.

14. The defendant would deny the allegations contained in paragraph 14 of the complaint.

15. The defendant would deny the allegations contained in paragraph 15 of the complaint.

16. All other averments which have not been admitted or denied are hereupon denied as if set out fully.

AND NOW having fully answered the plaintiff's complaint the defendant would respectfully urge this Court to dismiss this complaint.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General and Reporter

/s/ Michael W. Catalano
MICHAEL W. CATALANO
Deputy Attorney General
450 James Robertson Parkway
Nashville, TN 37219
(615) 741-6440

[Certificate of Service omitted in printing]

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

MARY REBECCA FREEMAN, for herself and all others similarly situated,	
Plaintiff,	No. 87-1763-I
vs.	ORDER FILED & ENTERED 7/20/88
W. J. MICHAEL CODY, in his capacity as ATTORNEY GENERAL AND REPORTER for the STATE OF TENNESSEE, DAVIDSON COUNTY ELECTION COMMISSION and METROPOLITAN GOVERNMENT OF NASHVILLE/DAVIDSON COUNTY, TENNESSEE,	MINUTE BOOK 269 PAGE 699
	IT IS SO ORDERED. COSTS ARE TAXED TO THE PLAINTIFF(S).
	/s/ Irvin H. Kilcrease Jr
	CHANCELLOR
Defendants.	

NOTICE OF VOLUNTARY NONSUIT AS TO THE DEFENDANT METROPOLITAN GOVERNMENT

Comes now the Plaintiff, Mary Rebecca Freeman, by and through her attorney, pursuant to Rule 41.01 of the Tennessee Rules of Civil Procedure, and submits this Notice of Voluntary Nonsuit as to the Defendant Metropolitan Government of Nashville/Davidson County, Tennessee, counsel for the parties having conferred and

being in agreement that any and all issues as to the Defendant Metropolitan Government have become moot.

Respectfully submitted,

/s/ John E. Herbison
JOHN E. HERBISON #12659
Attorney for Plaintiff
1205 Eighth Avenue South
Nashville, Tennessee 37203
(615) 254-6300

IN THE CHANCERY COURT FOR DAVIDSON COUNTY AT NASHVILLE, TENNESSEE

MARY REBECCA FREEMAN, for herself and all others similarly situated, Plaintiff, vs. W. J. MICHAEL CODY, in his capacity as ATTORNEY GENERAL AND REPORTER for the STATE OF TENNESSEE, DAVIDSON COUNTY ELECTION COMMISSION and METROPOLITAN GOVERNMENT OF NASHVILLE/DAVIDSON COUNTY, TENNESSEE. Defendants.	)	Civil Action No. 87-1763-I Filed JUL 24 1989 Filed AUG 31 1989

TRANSCRIPT ON APPEAL

OCTOBER 24, 1988

HEARD BEFORE: Chancellor Irvin Kilcrease Davidson County Chancery Court Nashville, Tennessee

* * *

[p. 18] MS. MARY REBECCA FREEMAN, having been previously sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HERBISON:

Q. State your name, please.

A. My name is Mary Rebecca Freeman.

Q. Ms. Freeman, what is your occupation?

A. I'm an attorney.

Q. Ms. Freeman, what political office do you hold?

A. I am the democratic committee woman from the Seventh Councilmatic District. I'm a member of the Davidson County Democratic Executive Committee. That's a political office within the Democratic party.

Q. Okay. How long have you been involved in politics?

A. Since 1970.

Q. And where have you principally been involved in politics?

[p. 19] A. Primarily, in Nashville, Tennessee. Before I was registered to vote in Nashville, I was also registered to vote in Murfreesboro, where I resided at the time.

And when I moved back to Nashville, after I completed graduate school, I changed my registration to Davidson County.

Q. Okay. Has your political activity been – been on a purely local level, that is, within Davidson County?

A. No, it has not exclusively been on the local level. I have worked in numerous local elections, but I have

also worked in state-wide campaigns. I was the coordinator of the voter registration and get-out-the-vote effort for the Carter campaign in 1980 in Tennessee.

And during – particularly during that campaign, I worked throughout the state. And I organized voter registration for the Carter campaign, and also election day activities in every county in the state.

[p. 20] I also have worked in two other campaigns that are state-wide. I worked in 1978 as a – in Bill Bruce for U. S. Senate campaign, which was a state-wide – he was a candidate in the Democratic primary.

And I also worked in the general election in 1978 as – well, for Keith Bissell, who is currently the Public Service Commissioner. And I – that was a full time position, also.

Q. Okay. Ms. Freeman, what activity – what particular activities have you engaged in on election day for the past several years?

A. Well, almost every election day – I think I counted three election days in the past 17 years I have not worked at polls. But almost every election day, I have worked at polls on behalf of a candidate.

When I say work a poll, I've bee [sic] been a poll worker, outside of a poll – a polling place, principally, my own, which is in east Nashville. But I have [p. 21] worked several other places on behalf of different candidates, soliciting votes, talking to voters.

In some cases, soliciting persons to support various issues, but primarily for candidates running for office.

Q. What have you observed as to where these – where the polling places type of activity has been traditionally been permitted?

A. Well, in the past, in Davidson County, it's been my experience that the Election Officials permitted activity – poll workers to –

MR. CATALANO: Your Honor, I'm going to object. She can only testify as to what she actually saw.

THE WITNESS: I was testifying as to my experience.

MR. HERBISON: I believe she has testified as to what she has observed.

MR. CATALANO: I just want to make it clear that she is testifying about as to what –

[p. 22] THE COURT: I understand.

MR. CATALANO: – she saw, as opposed to –

THE COURT: All right. This is on personal knowledge.

THE WITNESS: Well, as I say, as to my own personal experience and personal knowledge, everything that I have seen is – well, indicates that the Election Commission officials have enforced what's called or listed as a hundred-foot boundary, and have allowed persons to solicit votes and to approach voters outside a boundary, which is approximately a hundred feet from the door of a polling place.

And that has been – I've seen few infractions of that. When they have, I've seen it taken care of pretty expeditiously.

BY MR. HERBISON:

Q. Okay. You filed this lawsuit on July 28th of 1987. At the time you filed this lawsuit, did you have any problem with the traditional interpre- [p. 23] tation of the statute?

A. Well, I disagreed with it, but I lived with it. I felt like it – well, I just lived with it.

The problem I had at that time, that really caused – well, prompted me to file the lawsuit, was that the traditional interpretation, from my understanding from talking with Election Officials or personnel, and from talking to persons – at that time, I was the treasurer for a campaign.

I was the treasurer for the Committee to elect Tom Watson. Tom Watson is a local attorney, and he was running for Metro Councilman of Davidson County. And in that position, I had regular contact with Tom and with the campaign.

And Mr. Watson was a candidate in the August election, and he had received correspondence from the Election Commission, to the effect that the traditional interpretation was going to be changed. And we had heard other information to indicate that it in effect, [p. 24] had been – the pattern of enforcement was going to be changed.

I'll discuss that, if you –

Q. Okay. And what were these conversations based upon which you feared that the traditional –

A. All right.

Q. – interpretation would be –

A. Well, it wasn't just conversations. But I had – first of all, the – let me go back to this letter for a minute.

Mr. Watson received a letter. And it was his understanding, my understanding, from – I believe I read the letter. But, in any case, from talking to him, that the statute was going to be enforced, so that a person could not only – not only – the traditional interpretation of the hundred-foot boundary law was going to be changed.

And that it would be more restrictive. That poll – what I understood was, that poll workers were not [p. 25] going to be allowed on the grounds of the polling place. That no, you know, literature, no signs or anything would be permitted to on the grounds of the poll place.

Now –

Q. Ms. Freeman, why did that concern you?

A. Well, it concerned me because I intended to work a poll that day on behalf of Tom Watson, and I intended to – I hoped to work polls for candidates in the future.

I know that by working a poll, I can convince people to vote for some individuals, because I've done it for so long, that I know I can have a positive effect for the candidate that I work for.

Now, I'm not saying that all people are influenced by poll workers. But I think there's a significant number,

particularly in races where there are numerous people on the ballot, or races that don't have as much publicity as some others, a poll worker is particularly [p. 26] effective in that regard.

If you have a race far down on the ballot, as opposed to one where a reminder of name recognition, is all that suífices.

Q. Okay. You testified that you are a member of the Davidson County Democratic Executive Committee. How do you get elected for that office?

A. I ran for election. And I'm elected to that office every two years by the voters. And they – persons who vote in the Democratic Primary in even-numbered years.

Q. Based upon your experience as a candidate for office, what have you observed as to what means of communication are most effective as to your particular office?

A. Well, as to my particular office, the best way I can get votes – or the most effective way, is to be at the polls or have the poll workers on election day, to solicit votes for me.

It's a race that, as I said, [p. 27] it's usually about at the bottom of the ballot. And if you have a number of people running for office in the Democratic Primary or in a General Election, concurrent at that time, people – voters tend to kind of lose sight of who you are.

I have tried other methods, but I -- because I've worked for so long, and because I'm known in the community where I live, I have – I feel like I'm effective in

that I remind people of who I am, and that I'm running, or the persons working on my behalf also do that.

Q. Why would other means of communication, such as paid advertising, be less effective?

A. Well, for the most part, they're not district specific, and they're not cost effective. When I ran district specific, I run in one Councilmatic District. For example, run an advertisement in the community newspaper would cost me thousands of dollars. I can't afford that.

[p. 28] To run radio or television advertising, for example, would not also reach – it may reach some people I needed to reach, but it won't reach – but it will be also cost prohibitive.

Now, there are other methods, but basically, reminding people of who you are; what you're running for, on election day, seems to be most effective in my particular race.

Q. Ms. Freeman, based upon what you have observed, what effect does the 100-foot boundary have on your ability to communicate with perspective voters?

A. Well, in some cases, it's – it does not allow me to reach voters, and the effect varies from polling place to polling place. And I have to – have to explain that.

The particular polling place where I vote – it happens to be the largest precinct in my Councilmatic District – most of the persons who come to the poll happen to drive – not all of them, and they park outside the 100-foot [p. 29] boundary.

But that's not true in all cases. Another polling place within my Councilmatic District is the Gallatin Road Firehall. The distance from the entrance to the firehall to the street is probably 30 feet.

If a person observes the 100-foot boundary, they'll be on the other side of Gallatin Road. There's no place to be – to work that poll, and be able to reach voters, and to be within the law.

The thing that – there is another poll, also, where there is a similar problem. Sometimes you can – the District boundaries, or the hundred-foot boundary, would exclude part of your ability to reach or talk to some people.

Now, I should say that one problem – you want to remind people of who you are. But, of course, you know –

Q. Okay. Have you ever observed any communication, other than political communications, going on at those places?

[p. 30] A. Well, yes, I have, on a limited basis. I have seen some – and I was trying to think of the example of the company, and I cannot remember it – but, in years past, I have seen some commercial solicitation, and by that I mean somebody passing out a handbill.

I have also seen – well, what I think, the line blurs as to what is political communication and what is other types of communication.

There are people that work polls on behalf of particular issues, for various reasons. And one of those reasons may be a religious reason.

For example, the people that opposed the race track issue last – in '87. A lot of those people – the poll workers that I spoke to, most of them told me that they were there because they had been asked by their church to be there.

And for them –

MR. CATALANO: Your Honor, I'm going to have to object. She's getting into hearsay.

[p. 31] THE WITNESS: I'm sorry.

THE COURT: I sustain the objection.

THE WITNESS: But my point is that people – that communication is not just – it's not purely political all the time. Politics is the amalgam of a number of different issues in life.

BY MR. HERBISON:

Q. Ms. Freeman, I'd like to ask you about a hypothetical situation. If –

MR. CATALANO: I'm going to object. You've laid the foundation for her to testify as an expert witness. If you ask her –

MR. HERBISON: I intend to ask her a question about what she would do in a hypothetical situation. It does not call for expert opinion testimony; it calls for what her contention under a specific set of circumstances would be.

THE COURT: Well, you'd have to have the underlying facts in the record, before you could ask a hypothetical question.

[p. 32] MR. HERBISON: Okay.

Q. Ms. Freeman, you've indicated that you have been involved in some activity outside Davidson County.

A. Yes, that's correct.

Q. Is it possible that you would work a polling place in Sumner County in the future?

A. If I – if the – if I was working in a state-wide campaign, or if a particular candidate asked me, that I could support, I probably would.

MR. CATALANO: Your Honor, I object to that testimony, that's speculation on her part.

THE WITNESS: Your Honor –

THE COURT: It's speculative. I sustain the objection.

THE WITNESS: Could I go back to one of your questions?

BY MR. HERBISON:

Q. Yes. If you have something that needs to be clarified.

A. Well, just – back to a few minute [sic] ago, we were talking about 1987, [p. 33] and the events that occurred at that time when we brought this lawsuit. I wanted to just add a little bit to something I said.

The – before I filed this lawsuit, I talked to two persons who had attended the poll worker's school in Metro Nashville, with the Election Commission.

Q. Who were these persons?

A. Well, I believe I talked with Raymond James and also with a woman named Anne Deowe. And they are officers of election at two various polling places.

And it was their understanding from the election school, that the enforcement of the 100-foot boundary would not allow any solicitation of votes or any distribution of materials on the grounds of the polling place on election day.

And I, of course, was fearful – and when I say fearful, I thought if I did it, I'd probably be arrested or cited, or whatever, if I went ahead and did it.

And there was one other [p. 34] thing that brought this issue to mind. In conversations with Tom Watson, the man with whom I worked in the Councilmatic race, I found out that voters who were voting in person, absentee, at Howard School were asked to – or at least one person was asked to move his car because he had a bumper sticker promoting a particular candidate.

MR. CATALANO: Your Honor, I'm going to object to that, because that is hearsay.

THE COURT: Sustain the objection. This witness has to testify as to what she has experienced. It doesn't matter –

THE WITNESS: I'm sorry, Your Honor.

THE COURT: – not what someone told her.

MR. HERBISON: Okay.

THE WITNESS: I'm trying to explain why –

THE COURT: I know what you're trying to do, but it's [p. 35] inadmissible.

MR. HERBISON: Judge, if it goes to the effect that this communication had on her state of mind, I would submit that it's proper testimony.

THE COURT: Well –

MR. HERBISON: Her state of mind was apprehension of criminal prosecution.

THE COURT: If she's talking about what somebody told her, and she got afraid, I'm not going to consider what someone told her. But she can testify to that, and based on that these rumors, that she decided – what she decided.

MR. HERBISON: Okay.

Q. Ms. Freeman, was there anything else that caused you to be fearful of criminal prosecution when you filed this lawsuit?

A. Well, basically what I've said.

Q. Okay. Ms. Freeman, how frequently have you voted since you became eligible to?

[p. 36] A. I think I've voted every time. I may have missed one election since I was eligible to vote. The law changed sometime – I think it was about 1970, to allow persons 18 years old to vote.

Q. Okay. Have you received political communications at the polling place?

A. Yes, I have.

Q. And what effect have these communications had upon you to the best of your voting behavior?

A. Well, each one is an individual case, but in some cases, my vote has been swayed by information I've received at the polls. That's occurred primarily in circumstances where a race is I'm not familiar with a candidate, or I might encounter a person who knows the candidate, or knows more about a particular issue.

And I don't – if I can ask the person questions, sometimes I get some information that will convince me to vote [p. 37] one way or another.

MR. HERBISON: Okay. I believe that's all I have of this witness.

THE COURT: You may cross examine.

[p. 38] CROSS EXAMINATION

BY MR. CATALANO:

Q. Ms. Freeman, have you ever been prohibited by any Election Officials from distributing campaign literature or soliciting votes beyond the 100-foot boundary?

A. Beyond the 100-foot boundary?

Q. Yes.

A. I think I have, but I think the election official didn't know where the boundary was. I would have argued with an official as to where the boundary was at the time.

Q. But you have – you have solicited votes and distributed materials beyond the 100-foot boundary at elections?

A. Beyond the 100-foot boundary I have, that's correct.

Q. And in quite a few elections.

A. That's correct.

Q. And I believe you said that [p. 39] you've seen on a limited basis, commercial solicitations at polling places. Can you name one particular instance, were there any other instances?

A. Mike, not that I can recall, honestly. I've been trying to remember that, and I have a vague memory of that. I think there was one occasion?

Q. Any religious solicitations?

A. Indirectly, yes.

Q. Indirectly, what do you mean?

A. I mean people were espousing their religious beliefs by working for a particular candidate, or for a particular cause.

Q. But they were trying to solicit votes, they weren't – they weren't trying to collect money for a religious organization?

A. I've never seen anyone try to collect money for a religious organization –

Q. Or pass out pamphlets for a religious organization that had absolutely [p. 40] nothing to do with the election that's going on?

A. Well, I have – now, let me explain. I haven't seen a person do that at – to persons coming in to the polls.

But for polling places that are within religious – within churches, for example, that's a perfectly natural thing to do.

And it may occur on a polling places or within a 100-foot boundary, but I haven't seen a person –

A. I'm just asking what you've seen, personally.

A. I have not seen a person hand out a pamphlet.

Q. And you've been in quite a few elections? I mean, you've been – worked the polling places at quite a few elections; is that correct?

A. Yes, sir, I primarily work one poll, but I have worked others.

Q. And you're a resident of Davidson County; is that correct?

A. That's correct.

MR. CATALANO: No further [p. 41] questions, Your Honor.

THE COURT: Anything further?

MR. CATALANO: No, Your Honor.

[p. 42] REDIRECT EXAMINATION

BY MR. HERBISON:

Q. Ms. Freeman, even though you're a resident of Davidson County, have you ever participated in procuring election day workers in other counties?

A. Yes, I have.

Q. Okay. When was that?

A. Particularly during 1980, during the Carter reelection campaign. As I said, I worked – I supervised that effort in all 95 counties of the state.

Q. Okay.

A. And tried to get people to work polls. And supervised other persons doing that in each county.

MR. HERBISON: Okay. That's all the redirect.

MR. CATALANO: No further questions.

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: Call your next [p. 43] witness.

MR. HERBISON: That's all the witnesses the Plaintiff intends to call.

THE COURT: Plaintiff rests. What says the Defendant?

MR. CATALANO: I would call Ann Alexander, Your Honor.

[p. 44] MS. CONSTANCE ANN ALEXANDER, having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CATALANO:

Q. Could you state your name for the record?

A. My name is Constance Ann Alexander.

Q. And, Ms. Alexander, what is your present occupation?

A. I'm the Registrar at Large for Davidson County.

Q. How long have you been the Registrar for Davidson County?

A. I've been Registrar for Davidson County for two-and-a-half years.

Q. And prior to that time, where were you employed?

A. I was executive secretary for the Election Commission.

Q. And how long were you in that position?

[p. 45] A. I was in that position for nine years.

Q. Okay. And is that all your employment history with the Davidson County Election Commission?

A. Yes.

Q. As Registrar at Large for Davidson County, what are your duties, just in the general sense?

A. In a general sense, it's to assure the purity of the ballot, to be sure that everyone is given equal opportunity to vote, and to register to vote. And to oversee the day-to-day operation of the Election Commission office.

Q. But more specifically, on election day, what are your duties and responsibilities?

A. My duties on election day is to assure that the Election Officials operate under the state law, and run

each polling location under the state law, as set out in the statute.

Q. Are these Election Officials [p. 46] who work at polling places, were these people – do they – do they work for the Election Commission on a regular basis, or do they work just at each particular election?

A. Each particular election.

Q. Are they trained in any way?

A. Yes, they are. We're required to train them before each election.

Q. How much training are they given?

A. They are given an instruction school, which lasts about an hour-and-a-half, before each election.

Q. Talking about training, have you had any particular courses dealing with the election laws – training courses?

A. Yes. We have a seminar each year, and I'm also certified as a Registrar for the State of Tennessee.

Q. What is certification –

A. Certification means that you have passed the testing as far as the laws [p. 47] that are set out in Tennessee Code, as far as elections are concerned.

Q. So a test is given.

A. (Witness nods head in the affirmative.)

Q. Is it a one time test, or is it a periodic test?

A. It is a one-time test. Once you are certified, you are required to go to the seminars. And those seminars update you on whatever law changes are made.

Q. Did you request an opinion letter from the Attorney General's office as to the meaning of a particular language in Tennessee Code Annotated 27111?

A. Yes.

Q. What was your understanding of – let me ask this first. What was the particular language that you were asking the Attorney General to interpret?

A. At that time, the Commission was concerned about signs being placed on the property. And we had asked for an opinion to clarify what was meant as far [p. 48] as the signs being placed on the property of voting regulations.

Q. What was your understanding prior to asking for the opinion, as to the meaning of that statute about the display of signs, and materials, on the grounds?

A. My understanding was that anyone could solicit beyond the 100-foot boundary marker, and carry signs, or hand-out literature, whatever they needed to do to campaign for their candidate, beyond that 100-foot boundary marker.

Q. When the opinion was issued, what action did you take?

A. When the opinion was issued, that the actual opinion, with no alterations, was put in a binder and given to each of the Election Officials, for their reference

on election day, so that they would be sure that they would be doing what was set out in the opinion.

Plus, the opinion came in the middle of some of the instruction schools, and from that day forward, we instructed the Election Officials as to [p. 49] what the opinion said.

The election – the opinion was read to those. And it was – you know, to my understanding, everyone understood clearly what was in the opinion.

Q. What was –

MR. HERBISON: Objection to her testifying as to what the Election Officials understood; that is lack of personal knowledge.

THE COURT: I will sustain the objection.

BY MR. CATALANO:

Q. What was your understanding as to what was –

A. My understanding was that the – any campaign worker could still campaign beyond the 100-foot boundary marker, but they could not put signs in the grounds – on the grounds of the voting location.

Q. And did you convey that understanding to the Election Officials?

A. Yes.

[p. 50] Q. Let's get to the 100-foot boundary. What is your understanding as to the rule? I'd like you to – I know you've already –

A. The rule of the 100-foot boundary marker, is to give candidates who have poll watchers, the opportunity

to do last minute campaigning before the voters go into to vote.

And as long as they do it beyond that 100-foot boundary marker, they are within the statute.

Q. When you requested the opinion of the Attorney General about the placement of signs on the grounds, was your question in anyway directed to the 100-foot rule, directly?

A. The question was directed to – it was mainly to the 100-foot rule, but, it was basically to the matter of having signs put on the grounds of the property.

And the reason for that was because in 1986, the County had to pay for a candidate to have signs taken up, [p. 51] because he refused to take the signs off the grounds where we had a private location, which was a church. So we had to defray the costs of having those signs removed.

Q. Exactly how is the 100-foot rule enforced?

A. The 100-foot rule is enforced by the officer to mark off that 100-foot boundary marker. And they are told to enforce it as close to the walls as they possibly can.

We have inspectors of elections that also monitor the voting locations, and they help the officers to see that law is abided by.

Q. On election day, in the past, have you gone to the polling – any of the polling places, as part of your duties?

A. Yes, I have had the opportunity to go into one of the voting locations.

Q. And did you observe the 100-foot rule being enforced?

[p. 52] A. I observed the 100-foot rule being enforced. And I also observed a lot of voters being perturbed because they were having things pushed in their windows –

MR. HERBISON: Objection to this witness testifying as to the voters' state of mind.

MR. CATALANO: I think she's testifying, Your Honor, as to what she observed. I think –

THE COURT: I'll overrule the objection. She may testify as to what she saw.

THE WITNESS: The voters – it was obvious that the voters were upset, because they were having things placed – pushed in the windows. As a matter of fact, that's why I went out there, because we have –

MR. HERBISON: Objection to the testimony that the voters were upset.

THE COURT: Overruled.

BY MR. CATALANO:

Q. Did you see campaign workers [p. 53] beyond the 100-foot boundary distributing campaign literature –

A. Yes.

Q. – and soliciting votes?

A. (Witness nods in the affirmative.)

Q. And at the time that you found that – been to the polling places on election day, what's the – could you

give me an estimate as to the number of campaign workers that would be at a particular polling place, that you saw?

A. I estimate as many as 10.

Q. Have you witnessed any incidents involving the 100-foot rule?

A. We have – I have witnessed some incidents, where there was an argument between a voter and an intoxicated poll watcher. And that person had to be hospitalized because there was a brief altercation.

Q. On the times that you have observed the polling places on election day, were the campaign workers able to distribute their literature?

[p. 54] A. Yes, they were.

Q. And were they able to solicit votes?

A. Yes, they were.

Q. I believe you heard testimony with regard to the Gallatin Road Firehall voting precinct. To your knowledge, as Registrar, are individuals able to solicit votes, and distribute campaign literature outside the 100-foot boundary?

A. Yes, they are.

Q. As Registrar at Large of Davidson County, do you have any opinion as to what would happen at the polling places in Davidson County if the 100-foot rule was abolished?

A. I feel it would be total havoc. We've had havoc in the voting locations before without the 100-foot boundary

marker. There would be room for error, as far as totaling the votes. And as far as us having an accurate count, as near as possible, to bring in to us to certify to the State, I think the voting [p. 55] location would be overcrowded. The officer would not be able to conduct the election in a manner in which he should be able to conduct it.

I just see it as total havoc, because each candidate can have a poll watcher inside the location now, as well as the people beyond the 100-foot boundary marker.

If the 100-foot boundary marker were taken away, then we would have people campaigning inside. And we've had calls from voters – I've talked to voters where they felt like already their rights, their privacy was infringed upon by the handing out of the campaign material.

Q. The poll watchers, as opposed to campaign workers, do they – you say they're inside where the voting occurs – are they allowed to distribute campaign materials?

A. They are not allowed to distribute campaign material. They are there to assure that that candidate – the purity of that – the purity of the [p. 56] process for that candidate.

Q. As Registrar at Large for Davidson County, are you aware of any incidents of where either a private company or a religious denomination distributed literature or material within the 100-foot boundary on election day?

A. Not that I am aware of, no.

MR. CATALANO: No further questions at this time, Your Honor.

[p. 57] CROSS EXAMINATION

BY MR. HERBISON:

Q. Ms. Alexander, if there were persons at the polling places soliciting for charitable organizations inside that 100-foot boundary, would that pose the same kind of problem as persons soliciting votes inside that boundary?

A. Yes, it would. And if it posed the problem, our inspectors would take care of it. We have to assure that there is no interference from anyone, as far as the voting process is concerned.

Q. And isn't it true that if there is such interference, there are statutes other than the one challenged at bar, today, that are able to deal with that?

A. Yes, there are statutes.

Q. Okay. In fact, it's unlawful for someone to interfere with someone's voting rights irrespective of a 100-foot boundary; isn't it?

A. That's correct.

[p. 58] Q. Ms. Alexander, isn't it true that at some polling places there is a parking area less than 100 feet away from the door of the polling place?

A. Yes.

Q. And isn't it true that under the statute, as we have it, poll workers are prohibited from soliciting these voters, if they park within the 100-foot area?

A. Okay. In the legal opinion that was handed down, anyone that would like to park, would have bumper stickers on their car. And they can leave it there for two hours, and that's a form of campaigning.

Q. However, if a voter were to come park within 100 feet of – assume a voter were able to park 20 feet away from the door of a polling place –

A. No, they would not be able to campaign.

Q. And persons who wanted to solicit that person's vote, would not be able to do that; would they?

[p. 59] A. Not unless they met them back of the 100-foot boundary marker.

Q. In fact, there are some polling places where the entire grounds of the polling place are inside the 100-foot radius; aren't they?

A. Yes, there are, but we've not had any problems with anyone campaigning for that use beyond the hundred-foot boundary marker.

Q. Okay. Ms. Alexander, are there any guidelines promulgated by the County Election Commission as to what campaign literature is?

A. No, there is not. But any campaign literature is, of course – and Commissions have come up with in the past. And I think it is stated in that law, that any literature is anything that is handed out for a candidate, whether it be leaflets, signs, hats, shirts, whatever. That's a form of campaigning, and that's been considered as literature.

Q. Okay. If the person was wearing a lapel badge with a picture of a [p. 60] donkey on it, would that be campaign literature?

A. In a Primary Election, yes, it would be construed as campaign literature.

Q. If it were a nonpartisan election, would that be construed as campaign literature?

A. I don't think that it could be, unless a person had someone's name on it specifically.

Q. If a person were distributing handbills, that say abortion is murder, would that be considered campaign literature?

A. Unless there was a question on the ballot specifically for that, no.

Q. The real definition of campaign literature depends on what's at issue on the ballot?

A. Correct.

Q. Okay. If a person were distributing handbills on behalf of a political figure, who was not standing for election on that day, could that person do [p. 61] that inside the 100-foot boundary?

A. No, they could not.

Q. Even though it's on behalf of a person who's not on the ballot?

A. If it's on behalf of someone that is not on the ballot – my understanding of your question was, it was for something that wasn't on the ballot that day.

Q. So if, for example, at the November 1988 election, a person were to be distributing literature, talking about how good a senator Albert Gore is, would that person be able to do that inside the 100-foot boundary?

A. As long as they do not interfere with the process, there is not anything – except if Albert Gore was not on the ballot then, it would not be considered until such time as he would be on the ballot.

Q. Okay. And if a person were distributing pamphlets with the message "Jesus Saves", would he be permitted to do that inside the 100-foot boundary?

[p. 62] A. As long as he did not create interference.

Q. Ms. Alexander, if you know, has there any [sic] been any discussion at the Davidson County Election Commission of prohibiting poll workers from the grounds of the polling places?

A. I believe in one meeting, leading up to the opinion that we asked for, a Commissioner did state – make that statement. But there are several times Commissioners makes statements in discussion before a motion is taken on it.

The Election Commissioners are required to uphold the law, as I am. And they just cannot abolish poll workers, as long as it's a part of the Tennessee Code.

Q. But there has been some discussion of that; hasn't there?

A. Yes. When a former Commissioner was on the ballot – on the Commission, there was discussion, yes.

Q. Okay. And not long after that discussion, the Election Commission [p. 63] directed you to ask for this opinion; didn't they?

A. Yes.

Q. Ms. Alexander, at the school for Election Officials, immediately prior to the August 1987 election, to your knowledge, were any Election Officials instructed to keep poll workers off the grounds of the polling places?

A. No. Maybe the officers misunderstood or whomever misunderstood. A lot of times, they are not listening attentively when we do instruction schools. But I do the instruction schools, and they were not instructed as to anything of that sort.

Q. Based on what you have heard, is it fair to say that there was some misunderstanding about it?

A. I am sure they misunderstood. That was my purpose for having the legal opinion itself, bound and give to the officers to be sure that they did not misunderstand what the ruling was.

Q. And isn't it true that the [p. 64] candidates for election in the August 1987 election were instructed not to places [sic] coworkers on their behalf on the grounds of polling places?

A. No.

MR. CATALANO: Your Honor, I think she just answered that question a few minutes ago.

MR. HERBISON: No. That question had not been asked. I was asking whether the candidate –

THE COURT: All right. She's answered it. You may go to the next question.

MR. HERBISON: I believe that's all I have.

MR. CATALANO: I just have a few – a couple of questions, Your Honor.

[p. 65] REDIRECT EXAMINATION

BY MR. CATALANO:

Q. Ms. Alexander, there were a couple of points made about some other statutes that prohibit interference with the Election Officials' duties, and also intimidation of voters.

If the 100-foot boundary were abolished, even if those particular statutes were enforced, what do you think would happen?

A. I think that we would have some people that would be prosecuted, because there would be some intimidation of voters, and there would be some interference as far as the poll officials conducting the election.

Q. Do you think that those statutes would be sufficient to take care of the problems that would be created by the chaos and confusion that you said would occur?

A. No, I do not. It would take care of a portion of it, and that is the [p. 66] intimidation and interference. But as far as the poll officials being able to operate under the manner that they should, and get the vote count in the manner in which they should, or conduct the election in the manner in which they should, I do not feel that it would be – that it would cover that.

Q. Would there still be confusion?

A. There would still be mass confusion.

Q. Would there still be possibility from mistakes

A. Yes.

Q. – by the Election Officials?

A. Yes, there would.

MR. CATALANO: Thank you.

[p. 67] RECROSS EXAMINATION

BY MR. HERBISON:

Q. Ms. Alexander, a person may be prosecuted for intimidating a voter or for prohibiting – or for preventing an election official from carrying out his duties, irrespective of the 100-foot boundary; isn't that true?

A. Yes.

Q. And you really don't have any personal knowledge of what would result if the 100-foot boundary were abolished; do you?

A. I do not have any personal knowledge, as fast as whether the 100-foot boundary marker would be – what effect it would have. I do have personal knowledge of what happened in August of 1987, and it was total chaos, because of the heat of the battle at that time for the mayoral candidate.

I have had poll officials to quit, because they had people reaching over them, getting things from the table,

[p. 68] like the poll list and the printout. And it affected their operating the election in the manner in which they felt like they could.

So I feel like I do have some idea, I do have some perspective as to what it would do if we had as many people in the voting location, if we did away with the 100-foot boundary marker.

Q. Isn't is [sic] true that in August of 1987, the 100-foot boundary was in force, and was being enforced?

A. It was in force, and it was being enforced. And the only people in the location were the one person per candidate. And think about the number of candidates that you have on the ballot at the time. And some of the locations are about as large as this room, or smaller.

And you have as high as six or seven voting machines, 15 Election Officials, and one person per candidate. There's no way that an election official or an officer of election could oversee and to be sure that the process would go [p. 69] on in the manner that it should.

Q. And isn't it true that that's the case whether there's the 100-foot boundary or not?

A. I feel we don't have as much chaos. In '87, as I said, that did happen. And that was a concern, and that was a concern to the extent to where we had some representatives that tried to introduce a bill to try to alleviate some of these problems.

As I said, if you have one person, which everyone is allowed, in the voting location, you have as high as 172 candidates on the ballot, and each of those decide to have one person inside, and then you take away the 100-foot

boundary marker, and those people will be able to campaign all the way to the machine with those people, I feel it would be a great interference.

Q. And wouldn't the same interference be imposed by the charitable solicitation or religious solicitation?

A. Of course. And at that [p. 70] time, that's why we have inspectors of the election. If it creates that problem, that problem will be taken care of, also.

MR. HERBISON: Okay. that's all I have. Just a moment please. That's all.

MR. CATALANO: No further questions, Your Honor.

THE COURT: You may step down.

MR. CATALANO: That is the Defendant's proof.

THE COURT: All right. Any rebuttal, Mr. Herbison?

MR. HERBISON: No, further witnesses.

THE COURT: You may make your closing arguments.

* * *

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART I

MARY REBECCA FREEMAN, Plaintiff, v. CHARLES W. BURSON, in his Capacity as Attorney General and Reporter for the State of Tennessee, *et al.*, Defendants.	)	No. 87-1763-I ORDER FILED & ENTERED 5/5/89 MINUTE BOOK 274 PAGE 404

FINAL ORDER

This case came on to be heard before the Honorable Irvin H. Kilcrease, Jr., on October 24, 1988, on the merits. After considering the testimony of witnesses, stipulation of facts, and argument of counsel, this court Orders the following:

1. The Memorandum issued by this court and filed on April 26, 1989, is incorporated by reference into this Order.

2. T.C.A. § 2-7-111 does not violate the First and Fourteenth Amendments to the United States Constitution, nor Article I, §§ 8 and 19, or Article XI, § 8 of the Tennessee Constitution.

3. The plaintiff's complaint is DISMISSED.

/s/ Irvin H. Kilcrease Jr
CHANCELLOR IRVIN H. KILCREASE, JR.

APPROVED FOR ENTRY:

/s/ Michael W. Catalano
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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART I

MARY REBECCA FREEMAN, Plaintiff, vs. CHARLES W. BURSON, in his capacity as ATTORNEY GENERAL AND REPORTER for the STATE OF TENNESSEE, et al., Defendants.	)	No. 87-1763-I Filed MAY 18 1989

NOTICE OF APPEAL

Notice is hereby given that Mary Rebecca Freeman, the Plaintiff in the above-styled action, hereby appeals to the Supreme Court of Tennessee from the final order in this cause entered on the 5th day of May, 1989. The constitutionality of a statute being the sole determinative question, this appeal as of right is to the Supreme Court pursuant to Tennessee Code Annotated § 16-4-108.

Respectfully submitted,

/s/ John E. Herbison
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[Certificate of Service omitted in printing]

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART I

MARY REBECCA FREEMAN, Plaintiff-Appellant, vs. CHARLES W. BURSON, in his capacity as ATTORNEY GENERAL AND REPORTER for the STATE OF TENNESSEE, et al., Defendant-Appellees.	)	No. 87-1763-I ORDER FILED & ENTERED AUG 18 1989 MINUTE BOOK 276 PAGE 351

AGREED ORDER CORRECTING AND APPROVING TRANSCRIPT

It appears that the parties are in agreement that the Plaintiff's Motion to Correct Transcript in the above-styled matter is well taken and should be granted. The Transcript of Evidence filed with the Clerk and Master on July 24, 1989 is accordingly approved, subject to the following additions and/or corrections. It is ORDERED:

1) That the words, "in seeking[,]" appearing at Page 6, line 19, be corrected to read, "and seeking[.]"

2) That the words, "election from[,]" appearing at Page 8, line 6 be corrected to read, "election for[.]"

3) That the words, "her contention[,]" appearing at Page 31, line 20, be corrected to read, "her intention[.]"

4) That the words, "Anne Deowe[,]" appearing at Page 33, line 11, be corrected to read, "Ann Deol."

5) That the words, "aren't they?" appearing at Page 59, line 6, be corrected to read, "aren't there?"

6) That the word, "suffered[,]" appearing at Page 70, line 21, be corrected to read, "suffers[.]"

7) That the word, "greater[,]" appearing at Page 70, line 22, be corrected to read, "greatest[.]"

8) That the word, "fact[,]" appearing at Page 70, line 24, be corrected to read, "facet[.]"

9) That the question mark appearing at page 71, the end of line 11, be corrected to indicate a period.

10) That the punctuation of the words, "invalidated this statute in part, because of this content distinction[,]" appearing at Page 72, lines 12-13, be corrected to read, "invalidated this statute, in part because of this content distinction."

11) That the words, "a valid basis comparison[,]" appearing at Page 73, lines 5-6, be corrected to read, "a valid basis for comparison."

12) That the words, "Dunn versus Weinstein," appearing at Page 73, lines 21-22, be corrected to read, "Dunn versus Blumstein."

13) That the words, "the State can't chose – can't constitutionally chose, means that[,]" appearing at Page 73, lines 24-25, be corrected to read, "the State can't choose – can't constitutionally choose means that[.]"

14) That the words, "Budish versus Barry," appearing at Page 74, line 9, be corrected to read, "Boos versus Barry[.]"

15) That the words, "about which[,]" appearing at Page 76, line 6, be corrected to read, "by which[.]"

16) That the words, "Roberts versus Olkahoma[,]" appearing at Page 79, line 16, be corrected to read, "Broadrick versus Oklahoma."

17) That the words, "Budish versus Barry," appearing at Page 82, line 5, be corrected to read, "Boos versus Barry[.]"

18) That the word, "Budish[,]" appearing at Page 82, line 17, be corrected to read, "Boos[.]"

19) That the words, "second area effect[,]" appearing at Page 91, line 25, be corrected to read, "secondary effect[.]"

20) that the word, "Budish[,]" appearing at Page 93, line 14, be corrected to read, "Boos[.]"

21) that the words, "probable extent[,]" appearing at Page 94, line 22, be corrected to read, "probable effect[.]"

22) That the Transcript of Evidence, along with the above coorections [sic], is approved pursuant to Rule 24(f) of the Tennessee Rules of Appellate Procedure.

It is so ORDERED. Enter this ___ day of ___, 1989.

/s/ Irvin H. Kilcrease Jr.
IRVIN KILCREASE,
CHANCELLOR

[Approved for entry and Certificate of Service omitted in printing]

(4)

No. 90-1056

In The

Supreme Court of the United States

October Term, 1990

CHARLES W. BURSON, Attorney General & Reporter for the State of Tennessee,

Petitioner,

v.

MARY REBECCA FREEMAN,

Respondent.

On Writ Of Certiorari To The Tennessee Supreme Court

BRIEF OF PETITIONER

CHARLES W. BURSON*
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QUESTION PRESENTED FOR REVIEW

Does Tenn. Code Ann. § 2-7-111 (Supp. 1990), which prohibits the distribution of campaign literature, display of campaign materials, or solicitation of votes within 100 feet of the entrance to a polling place on election day in Tennessee, violate the Free Speech Clause of the First Amendment of the United States Constitution?

LIST OF PARTIES

The parties in this case are Charles W. Burson, Attorney General & Reporter of the State of Tennessee, as petitioner and Rebecca Freeman as respondent.

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No. 90-1056

In The

Supreme Court of the United States

October Term, 1990

CHARLES W. BURSON, Attorney General & Reporter
for the State of Tennessee,

Petitioner,

v.

MARY REBECCA FREEMAN,

Respondent.

On Writ Of Certiorari To The Tennessee Supreme Court

BRIEF OF PETITIONER

OPINIONS BELOW

The decision of the Tennessee Supreme Court is cited as *Freeman v. Burson,* 802 S.W.2d 210 (Tenn. 1990). The decision of the trial court is unpublished but is found in the Appendix to the Petition for Writ of Certiorari at 1a-6a.

JURISDICTION

The judgment of the Tennessee Supreme Court was entered on October 1, 1990. (Petition for Writ of Certiorari, Appendix at 7a). The petition for writ of certiorari

was filed on December 28, 1990. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2).

STATUTORY PROVISION INVOLVED

[Tenn. Code Ann.] § 2-7-111: **Posting of sample ballots and instructions – Arrangement of polling place – Restrictions.** – (a) The officer of elections shall have the sample ballots, voting instructions, and other materials which are to be posted placed in conspicuous positions inside the polling place for the use of voters. The officer shall measure off one hundred feet (100') from the entrances to the building in which the election is to be held and place boundary signs at that distance. Provided, however, in any county having a population of:

not less than	nor more than
13,600	13,610
16,360	16,450
24,590	24,600
28,500	28,560
28,690	28,750
41,800	41,900
50,175	50,275
54,375	54,475
56,000	56,100
67,500	67,600
77,700	77,800
85,725	85,825

all according to the 1980 federal census or any subsequent federal census, the officer shall measure off three hundred feet (300') from the entrances to the building in which the election is to be held and place boundary signs at that distance.

(b) Within the appropriate boundary as established in subsection (a), and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building or on the grounds of any building in which a polling place is located.

(c) The officer of elections shall have each official wear a badge with his name and official title.

(d) With the exception of counties having a metropolitan form of government, any county having a population over six hundred thousand (600,000) according to the 1970 federal census or any subsequent federal census, and counties having a population of between two hundred fifty thousand (250,000) and two hundred sixty thousand (260,000) by the 1970 census, any county may, by private act, extend the one hundred foot (100') boundary provided in this section. [Acts 1972, ch. 740, § 1; T.C.A. § 2-711; Acts 1980, ch. 543, §§ 1, 2, 1987, ch. 362, §§ 1, 2, 4.]

STATEMENT OF THE CASE

A.

Facts Relevant To The Case

Since this case involves a facial challenge to the statute, the facts are sparse and undisputed. In the summer of 1987, the respondent, Rebecca Freeman, was campaign treasurer for the election of Tom Watson to the City

Council for Metropolitan Nashville-Davidson County, Tennessee. (Jt. App. at 3). Ms. Freeman received information to indicate that as a result of the issuance of an opinion by the Tennessee Attorney General on April 2, 1987, campaign workers would not be allowed to go onto the property of polling places to distribute campaign materials even beyond the 100 foot boundary set forth by Tenn. Code Ann. § 2-7-111 (Supp. 1990).[1] (Jt. App. at 5).

As a result of her misunderstanding as to the Tennessee Attorney General's interpretation of § 2-7-111, Ms. Freeman filed suit in Davidson County Chancery Court. (Jt. App. at 2-7). The focus of Ms. Freeman's challenge was two-fold: (1) the constitutionality of the prohibition of the display of campaign signs on polling place grounds, and (2) a challenge to the constitutionality of the 100 foot boundary. (Jt. App. at 5-6).

Only two witnesses testified at the trial on October 24, 1988, namely: Ms. Freeman and Constance Ann Alexander, the Registrar-at-Large for Metropolitan Nashville-Davidson County. As Registrar-at-Large, Ms. Alexander was responsible for conducting all elections in Davidson

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[1] The opinion of the Tennessee Attorney General of April 2, 1987 interpreted the phrase "on the grounds" in § 2-7-111(b) to mean "that campaign posters, signs or other campaign literature may not be displayed either within the 100-foot boundary or, in the event the property line of the building where the polling place is located extends beyond the 100-foot boundary, within the property line." Thus, Ms. Freeman could still under this interpretation electioneer 100 feet from the entrance to the polling place even if such a distance was within the grounds of the polling place. (Petition for Writ of Certiorari, Appendix at 3a-4a).

County. Prior to her appointment as Registrar-at-Large, Ms. Alexander served as Deputy Registrar-at-Large for approximately nine years. (Jt. App. at 33). The testimony of both witnesses focused upon the operation of the 100 foot boundary rule in the past and the possible effects of the elimination of the 100 foot boundary rule in future elections.

In the past, Ms. Alexander witnessed as many as ten or more campaign workers at particular polling places distributing campaign materials outside the 100 foot boundary on election day. (Jt. App. at 38-39). Furthermore, according to Ms. Alexander, individuals have been able to solicit votes and distribute campaign literature even where the 100 foot boundary went beyond the grounds of polling place.[2] Likewise, Ms. Freeman admitted that she had in fact distributed materials and solicited votes beyond the 100 foot boundary at elections in Tennessee over the past seventeen years. (Jt. App. at 18 and 29-30).

As for the distribution of material unrelated to the election such as commercial, charitable or religious solicitations, Ms. Alexander was unaware of any incident where either a private company or a religious denomination distributed literature or material at a polling place on

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[2] Ms. Freeman testified that at a particular polling place at a firehall on Gallatin Road in Nashville, the 100 foot boundary went to the other side of the Gallatin Road so there was "no place . . . to work that poll, and be able to reach voters." (Jt. App. at 24). However, Ms. Alexander testified that individuals are "able to solicit votes and distribute campaign literature outside the 100 foot boundary" at the Gallatin Road Firehall. (Jt. App. at 39).

election day in Nashville. (Jt. App. at 40). On the other hand, Ms. Freeman had a vague recollection of a single commercial solicitation occurring at a polling place in the past. (Jt. App. at 30). But, she could not recall any specifics with respect to that single incident and knew of no religious solicitations. (Jt. App. at 30).

As for the effect of abolishing the 100 foot boundary rule, it was the opinion of Ms. Alexander, as Registrar-at-Large, that there would be confusion and congestion at the polling places. (Jt. App. at 39-40). She indicated that at present, there are already a number of individuals located inside a polling place including voters, election officials, voting machine technicians and poll watchers.[3] If individuals are allowed to solicit votes in and around the polling place, it was the opinion of Ms. Alexander that there would be confusion and an increased possibility of errors made by election officials in the tabulation of votes. (Jt. App. at 46). Likewise, Ms. Alexander was concerned by potential congestion which would occur if campaign workers were allowed to solicit voters in and around the entrance to a polling place. (Jt. App. at 48). Although Tennessee has other statutes which impose criminal sanctions for intimidation of voters, it was Ms. Alexander's opinion that such statutes would not alleviate the confusion, congestion and possible errors which would be created by the abolition of the 100 foot boundary. (Jt. App. at 46-47).

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[3] According to Ms. Alexander, each candidate is entitled to have an individual at each polling place to watch the voting process to ensure its integrity; however, these individuals are not permitted to solicit votes. (Jt. App. at 40).

B.

Reasoning Of The Lower Courts.

The trial court held that: (1) the statute is content-neutral because "there is no reference to the content of the campaign materials to be displayed or distributed;" (2) the statute serves a compelling interest "with respect to the protection of voters and election officials from interference, harassment or intimidation during the voting process;" and (3) the statute provides alternate channels of communication for Ms. Freeman in that "she is free to distribute campaign materials and solicit voters 100 feet from the polling place." (Petition for Writ of Certiorari, Appendix at 5a-6a). Thus, the trial court concluded that the statute is a reasonable time, place and manner regulation. *Id.*

The Tennessee Supreme Court rejected the trial court's conclusion that § 2-7-111 is content-neutral. *Freeman*, 802 S.W.2d at 212. The Tennessee high court did conclude that the "State unquestionably has shown a compelling interest in banning solicitation of voters or distribution of campaign materials *within the polling place itself.*" *Id.* at 213. But, it also held that the "State has not shown a compelling interest in the 100-foot radius." *Id.* The Court did indicate that a 25 foot boundary might be a less restrictive means of accomplishing the State's interest and "might perhaps pass constitutional muster." *Id.* at 214.

SUMMARY OF ARGUMENT

It is the position of the petitioner that when a state in conducting an election, establishes a politically neutral zone near the entrance to a polling place for a limited period of time in order to ensure the integrity of the election process and to protect the exercise of the right to vote, such a law is a reasonable time, place, and manner regulation. This Court has upheld such regulations against First Amendment challenges as long as the following three part test is met: (1) the regulation is content neutral; (2) the regulation is narrowly tailored to serve significant government interests; and (3) the regulation leaves open ample alternative channels of communication. *U.S. v. Grace*, 461 U.S. 171, 177 (1983).

Tenn. Code Ann. § 2-7-111 is content-neutral because the justifications for the statute relate not to the content of the speech but to the following potential secondary effects created by such speech: (1) congestion and confusion for election officials at and around the polling place, and (2) delay and interference with voters as they seek to exercise their constitutional right to vote. Moreover, these justifications advance state interests of the highest order, namely: integrity of the election process and protection of the right to vote. This Court has indicated that preserving the integrity of the election process is of the highest order. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) ("preserving of the electoral process . . . [is an interest] of the highest importance"); *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013, 1024 (1989) ("[a] State indisputably has a compelling interest in preserving the integrity of its election process"). Likewise, protection of an individual's right to

vote as he or she enters the polling place implicates one of the most basic rights in a democracy. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government").

Not only are these justifications unrelated to the content of the speech regulated, they are also both significant and even compelling state interests. Tenn. Code Ann. § 2-7-111 is narrowly tailored to further these state interests in two respects. First, the 100 foot boundary prevents confusion and congestion at and around the polling place which could increase the risk of errors in the tabulation of election results by election officials. Second, the statute ensures that citizens are able to exercise a fundamental right on a neutral site free of delay and interference. Tenn. Code Ann. § 2-7-111 also provides ample alternate channels of communication by permitting any "electioneering" to occur outside the 100 foot boundary.

Even if the 100 foot boundary law is measured against the higher standard of strict scrutiny, it still passes constitutional muster. The Tennessee Supreme Court agrees that the integrity of the election process is a compelling interest which supports the regulation. *Freeman*, 802 S.W.2d at 213. Moreover, the two alternatives suggested by the Tennessee Supreme Court to the 100 foot boundary are not lesser restrictive alternatives which can further the state's compelling interests. First, the laws which make intimidation of voters a crime are after-the-fact enforcement mechanisms which do not address the confusion, congestion and delay problems. Second,

reducing the boundary to 25 feet is a difference in degree not a less restrictive alternative in kind. *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (upheld $1000 limit on campaign contributions against charge it was too low and should be higher).

The land within the 100 foot boundary on election day is not a public forum. The test in determining whether such land is a public forum is "the location and purpose" of the government property. *U.S. v. Kokinda*, 110 S.Ct. 3115, 3121 (1990) (O'Connor, J., plurality). The sole purpose of the use of the land within the 100 foot boundary, including its sidewalks, is the conduct of elections. The fact that commercial and religious solicitation is not prohibited is irrelevant in light of the fact that such solicitations rarely if ever occur at polling places on election day. Since such land is a nonpublic forum, the standard for its consitutionality is one of reasonableness and § 2-7-111 meets that standard because of the governmental interests in preventing confusion, congestion, delay and interference in and around the polling place on election day.

ARGUMENT

I. TENN. CODE ANN. § 2-7-111 (SUPP. 1990), WHICH PROHIBITS THE DISTRIBUTION OF CAMPAIGN LITERATURE, DISPLAY OF CAMPAIGN MATERIALS OR THE SOLICITATION OF VOTES WITHIN 100 FEET TO THE ENTRANCE OF A POLLING PLACE ON ELECTION DAY, IS A REASONABLE TIME, PLACE, AND MANNER REGULATION.

A. TENN. CODE ANN. § 2-7-111 (SUPP. 1990) IS CONTENT-NEUTRAL.

1. A Statute Is Content-Neutral If The Justifications For The Statute Relate To The Secondary Effects Created By The Speech Not Its Content.

In order for a law regulating speech to be a reasonable time, place, and manner regulation, it must first be determined to be content-neutral.[4] The essence of the content-neutrality requirement has been described by this Court as "the need for absolute neutrality by government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67, *reh'g denied*, 428 U.S. 873 (1976). Thus, viewpoint-based regulations have been

[4] If a statute is determined to be content-based, then it is subjected to the highest level of scrutiny requiring a state to "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

held to be content-based and subject to strict scrutiny. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (the First Amendment forbids government from regulating speech in ways to favor some viewpoints or ideas at the expense of others).

In *City of Renton v. Playtime Theatres*, 475 U.S. 41, *reh'g, denied*, 475 U.S. 1132 (1986), this Court applied the following definition of content-neutrality:

> In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." [citations omitted] The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley, supra*, 408 U.S., at 95-96, 92 S.Ct., at 2289-2290. (emphasis in original)

Id. at 48-49.

The Renton City Council had enacted an ordinance prohibiting "any 'adult motion picture theater' from locating within 1,000 feet of any residential zone, single– or multiple–family dwelling, church, or park, and within one mile of any school." *Id.* at 44. In addressing the issue of whether the ordinance was content-based because it treats theaters that specialize in adult films differently from other kinds of theaters, then Justice Rehnquist, writing for the majority stated the following:

> At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community.

Id. at 47. Since the "predominate intent" of the ordinance was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts and the quality of urban life,' " the majority concluded that the ordinance was "completely consistent with [the Court's] definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech,' [citation omitted]" *Id.* at 48.[5]

Failing to acknowledge the full scope of the legal principles regarding content-neutrality and secondary effects, the Tennessee Supreme Court rejected the application of the "secondary effects" analysis to the present case on the grounds that the *City of Renton* opinion was

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[5] The Ninth Circuit in *Renton* held that if a "motivating factor" in the enactment of the ordinance was content-based, then it "would be invalid, apparently no matter how small a part his motivating factor may have played in the City Council's decision." *City of Renton*, 475 U.S. at 47. This Court rejected that argument citing *U.S. v. O'Brien*, 391 U.S. 367, 382-86 (1968) ("[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it").

limited to "businesses that purvey sexually explicit materials" and did not apply to statutes limiting political expression. *Freeman*, 802 S.W.2d at 212. However, in *Boos v. Barry*, 108 S.Ct. 1157 (1988), Justice O'Connor, writing an opinion joined by Justices Stevens and Scalia, did in fact apply the "secondary effects" analysis to an ordinance regulating political speech in Washington, D.C. which prohibited the "display [of] any flag, banner, placard or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government . . . within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative." *Id.* at 1161.

Although Justice O'Connor concluded that the ordinance was content-based, the opinion re-affirmed the validity of a "secondary effects" analysis by saying:

> Applying these principles to the case at hand leads readily to the conclusion that the display clause is content-based. The clause is justified *only* by reference to the content of speech. Respondents and the United States do not point to the "secondary effects" of picket signs in front of embassies. They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies. Rather, they rely on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments. This justification focuses only on the content of the speech and the direct impact that speech has on its listeners. The emotive impact of speech on its audience is not a "secondary effect." Because the display clause regulates speech due to its potential primary impact, we conclude it must be content-based.

Id. at 1164.

In *Ward v. Rock Against Racism*, 109 S.Ct. 2746 (1989), this Court was confronted with a municipal noise regulation designed to ensure that music performances in a band shell owned by the City of New York did not disturb surrounding residents. In writing the opinion for the Court, Justice Kennedy cited the *City of Renton* case for the proposition that "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* at 2754. Furthermore, the *Boos* decision was cited by Justice Kennedy for the proposition that "government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.' "

Finally, in *U.S. v. Kokinda*, 110 S.Ct. 3115 (1990) this Court upheld a United States Postal Service ban on solicitation on postal premises. Justice O'Connor, writing for the plurality, said:

> Clearly, the regulation does not discriminate on the basis of content or viewpoint. Indeed, "[n]othing suggests the Postal Service intended to discourage one viewpoint and advance another . . . . By excluding all . . . groups from engaging in [solicitation] the Postal Service is not granting to 'one side of a debatable public question . . . a monopoly in expressing its views.' " [citations omitted].

Id. at 3124-25. *See also U.S. v. Kokinda*, 110 S.Ct. at 3125-26 (Kennedy, J. concurring) ("the postal regulation meets the traditional standards we have applied to time, place, and manner restrictions of protected activity.")

In this case the regulation is subject matter-based and viewpoint-neutral. It only alters the time, place, or manner of the public debate of the subject area without favoring or opposing a particular viewpoint. Where a subject matter-based regulation is justified by content-neutral state interests of the highest order, there is no reason to fear governmental suppression of particular viewpoints, especially since there must be ample alternate channels of communication in order for the law to be a reasonable time, place, and manner regulation.[6]

While § 2-7-111 does regulate an entire subject area of speech, it is viewpoint-neutral in that it is not "sympathetic or hostile" to a particular viewpoint, i.e. solicitors for Democratic candidates and solicitors for Republican candidates are treated the same by being required to solicit votes and distribute campaign material more than 100 feet from the entrance to a polling place on election day. Moreover, the justification for the statute involves state interests of the highest order rather than discrimination against the content of certain types of speech.

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[6] "Although a majority of the Court has never expressly countenanced less demanding scrutiny for subject matter-based restrictions of speech, it is nevertheless possible, based on the Court's jurisprudence, to state a more affirmative case for the continued vitality of a distinction between subject matter-based and viewpoint-based restrictions on speech." Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 Harv. L. Rev. 1904, 1916 (1989).

2. The Legislative History Of Tenn. Code Ann. § 2-7-111 (Supp. 1990) Supports The Conclusion That The Purposes Of The Statute Are To Remedy The Secondary Effects Of Confusion, Congestion, Delay and Interference Created By Electioneering At The Polling Place In Order to Further Important State Interests In Preserving The Integrity Of The Election Process And Protecting The Right To Vote.

The legislative history of § 2-7-111 shows that the statute is one of a number of election related procedural safeguards enacted by the Tennessee General Assembly to preserve the integrity of the election process and protect the right to vote by remedying the secondary effects of confusion, congestion, delay and interference created by electioneering at the polling place. The predecessor of § 2-7-111 was enacted in 1967. While the legislative debates of the 1967 Act do not provide definitive statements as to the legislative intent or purpose of the 100 foot boundary, the enactment came at a time of electoral reform in this country.[7] The 1967 Act provided that

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[7] In determining the legislative purpose of a statute, this Court has considered the historical context of the statute. *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987). This statute was enacted two years after the Voting Rights Act of 1965 and five years after *Baker v. Carr*, 369 U.S. 186 (1962), the Tennessee case that ushered in a new era of electoral apportionment. In *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), this Court noted that when enacting the Voting Rights Act, "Congress had found that case-by-case litigation [to enforce voting rights] was inadequate to combat widespread and persistent discrimination in voting because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." Within the historical

(Continued on following page)

"[i]t shall be a misdemeanor to distribute campaign literature of any nature on the same floor of a building, or within one hundred (100) feet thereof, where an election is in progress." 1967 Tenn. Pub. Acts, ch. 85. (Appendix to this Brief, at 1a).

In 1970 the constitutionality of this statute was challenged in *Piper v. Swan*, 319 F.Supp. 908 (E.D. Tenn. 1970), *writ of mandamus denied*, 401 U.S. 971 (1971). Although the district court denied the plaintiff's application to convene a three judge panel under 28 U.S.C. §§ 2281 and 2284, it did note that the First Amendment was not absolute and that other state courts had approved similar regulations. Indeed, almost every state in the country has some form of "electioneering" regulation at polling places on election day.[8]

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context of efforts to safeguard the voting rights of all citizens, Chapter 85 can be viewed as part of the national effort to create an atmosphere within which fair and impartial elections could be conducted.

[8] The following 47 States have "electioneering" type regulations: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. (Petition For Writ of Certiorari, Appendix at 21a-50a. *See also* Note, *Defoliating the Grassroots: Election Day Restrictions on Free Speech*, 77 Geo. L.J. 2137 (1989).

In particular, the district court in *Piper* quoted with approval the following language from *Fish v. Redeker*, 2 Ariz. App. 602, 411 P.2d 40, 42 (1966):

> The purpose [of a statute creating a misdemeanor for electioneering within 150 feet of the polls] is to prevent interference with the efficient handling of the voters by the election board and to prevent delay or intimidation of voters entering the polling place by political workers seeking a 'last chance' effort to change their vote.

Piper, 319 F.Supp. at 911.

The district court also cited the case of *State v. Black*, 54 N.J.L. 446, 24 A. 489 (1892) in which the New Jersey Supreme Court upheld a limitation on electioneering within 100 feet of a polling place. Specifically, the New Jersey court stated that "[t]he regulation is a proper one, to avoid disturbance and disorder immediately about the polls." *Id.*, 24 A. at 491.

Thus, judicial interpretation of the predecessor law to § 2-7-111 supports the conclusion that the purpose of the statute is to prevent delay or interference of the voters entering the polling place and avoid disturbance and disorder at the polls. These are the very justifications aimed at the secondary effects of speech which Justice O'Connor indicated in *Boos* were content-neutral. *Boos*, 108 S.Ct. at 1164 (congestion, interference with ingress or egress, visual clutter and embassy security).

In 1970, the Tennessee General Assembly directed the Tennessee Law Revision Commission to undertake a study of the election laws. S. J. Res. 92, 86th General Assembly, 2d Sess., 1970 Tenn. Pub. Acts 1061. The result

of the Commission's work was the adoption by the Tennessee General Assembly of the Election Code of 1972. *See* 1972 Tenn. Pub. Acts, ch. 740. The purpose of the new Election Code was to "regulate the conduct . . . so that: (a) [t]he freedom and purity of the ballot is secured [and] (d) [m]aximum participation by all citizens in the electoral process is encouraged." 1972 Tenn. Pub. Acts, ch. 740, § 102 [now codified as Tenn. Code Ann. § 2-1-102].

With respect to the "electioneering" statute, the Commission recommended the language that eventually became § 2-7-111. It was located in the seventh portion of the 1972 Act. *See* ch. 740, § 711. In addition to drafting the language of the Act, the Commission provided comments on the various portions. With respect to the seventh portion of the Act, the Commission's comment was that such provisions "should be liberally construed to provide for expeditious elections which are free of fraud and unnecessary burdens on voters." *See* An Elections Act Recommended to the 87th General Assembly by the Law Revision Commission with Section by Section Comments, 83 (1972) (Comments) (relevant portions included in the Appendix to this Brief at 7a.)[9]

The Commission's specific comments to the section setting forth the 100 foot boundary also indicate a

[9] Although these comments were not presented to the Tennessee Supreme Court in this case, this Court has taken judicial notice of a state statute's legislative history. *Territory of Alaska v. American Can Co.*, 358 U.S. 224 (1959); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

concern about making the polling place as "neutral" as reasonably possible:

> The present law prohibits electioneering within 100 feet, but it is not clear where the 100 feet is measured from. This section makes it clear that measurement is from the entrances to the building. This creates a 100 foot radius from each entrance which will be free of electioneering. This section also deals with a problem not clearly covered by the present law, the posting of signs on buildings and grounds where polling places are located. The goal is to make the site of polling places as neutral as is reasonably possible. The only legal way any kind of election materials may get into a polling place under this draft is as an aid to a voter who brings them in for himself.

Id. at 19a.

Additionally, the Commission also submitted a report to the Tennessee General Assembly, a portion of which sheds light on the purpose of the "electioneering" regulation which stated the following:

> *Numerous safeguards are included to preserve the purity of elections, such as* use of serially numbered ballots, use of duplicate registration records in all elections, attendance at polling place of poll watchers from various groups, *clarification of 100-foot boundary within which no campaign literature may be shown or distributed,* assistance by either a family member or election officials of different political parties in voting by the blind, physically disabled or illiterate, the channelling of all challenges through election judges, and the required state-wide use of voting machines with sanctions for non-compliance. [emphasis added].

Law Revision Commission of Tennessee, Special Report to the Eighty-Seventh General Assembly, 13 (January, 1972) (report included in the Appendix to this Brief at 55a).

The legislative history of § 2-7-111 provides a clear picture as to the two purposes of the statute. First, the 100 foot boundary is intended as a safeguard to secure "the freedom and purity of the ballot" by preventing the secondary effects of "disturbance and disorder immediately about the polls" which are created by electioneering at the polling place. *See* Tenn. Code Ann. § 2-1-102 (1985); *State v. Black*, 24 A. at 491. Second, the statute prevents another secondary effect caused by such electioneering of "delay" and "interference with the efficient handling of voters" by making the polling place as "neutral" as reasonably possible in order that voters may exercise their constitutional right to vote. *See Piper*, 319 F. Supp. at 911, quoting *Fish*, 411 P.2d at 42; Comments, Appendix at 19a.

In addition, it should also be noted that in Tennessee the legislature is presumed to know the interpretation which courts make of its enactments. *Hamby v. McDaniel*, 559 S.W.2d 774, 776 (Tenn. 1977). More to the point of this case is the following rule of construction: "the fact that the legislature has not expressed disapproval of a judicial construction of a statute is persuasive evidence of legislative adoption of the judicial construction, especially where the law is amended in other particulars or where the statute is reenacted without change in the part construed." *Id. See also Jones v. D. Canale & Co.*, 652 S.W.2d 336 (Tenn. 1983).

In *Piper*, the district court made clear its interpretation as to the purpose of the 1967 law through reference to similar "electioneering" laws in other states. This interpretation was not disturbed by the subsequent enactment in 1972. In fact, the 1972 law by expanding the regulation from distribution of campaign literature to include solicitation of votes and display of campaign material reaffirmed and clarified the purpose of the law to ensure the integrity of the election process and protect the rights of citizens to vote. These legislative purposes are content-neutral justifications.

3. The Operation Of Tenn. Code Ann. § 2-7-111 (Supp. 1990) Does In Fact Remedy The Secondary Effects Of Confusion, Congestion, Delay and Interference Created By Electioneering At The Polling Place So That Election Officials May Accurately Tally Votes and Voters May Exercise Their Constitutional Right To Vote.

The operation of Tenn. Code Ann. § 2-7-111 prevents the secondary effects of unnecessary congestion and confusion for election officials caused by electioneering at the polling place and furthers the state's interest in the integrity of the election process by ensuring an accurate calculation of the votes by election officials. The record reflects that polling places are already crowded with voters, election officials, election technicians and poll watchers. (Jt. App. at 48). The inclusion of zealous campaign workers in the polling place to solicit votes could result in incorrect tabulations of votes by the election officials, possibly tainting the election results. (Jt. App. at 39-40, 46). Just as the postal service found that "facility

managers were distracted from their primary jobs" by the competing demands of solicitors, *Kokinda*, 110 S.Ct. at 3124, poll officials could be distracted from their vote-related functions by demands of voter solicitors located in and around the polling place.

Furthermore, all too recently in our nation's history the polling places have been scenes of interference with the exercise of a basic right of American citizens. Only a few years before this statute was enacted, federal courts had to protect rural west Tennessee citizens seeking to exercise their right to vote. *U.S. v. Beaty*, 288 F.2d 653 (6th Cir. 1961) (injunction granted against landowners to prevent economic reprisals if sharecroppers registered and voted). The mere presence of campaign workers soliciting votes in close proximity to polling places could undermine the perception of a secret ballot and chill the exercise of voting rights.

The right to vote is one of the most basic constitutional rights at the foundation of democracy. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society.") Moreover, the state has an interest in encouraging maximum voter participation. Tenn. Code Ann. § 2-1-102(4). That interest is a compelling one. One way in which this fundamental right and this important state interest can be protected and advanced is by making polling places reasonably accessible in order for citizens to participate in government decision-making.

The secondary effects of congested polling places with crowds of campaign workers electioneering voters as they step into the voting booths would undoubtedly

create "havoc" (Jt. App. at 39-40) at the polling place. This disruption and interference by campaign workers does impinge in the minds of some voters on their privacy rights (Jt. App. at 40) and may in fact discourage some citizens from voting, a consequence which defeats the state's interest in encouraging maximum participation in voting. The 100 foot boundary eliminates these secondary effects and ensures that voters can exercise their constitutional right free from disruption and interference.

Both the legislative history and the practical operation of § 2-7-111 lead to the inescapable conclusion that the justifications for the statute are aimed at the secondary effects created by electioneering, not the content of any speech. Preventing disturbance and confusion around the polls for election officials and preventing delay and interference with voters are justifications which further state interests of the highest order unrelated to the content of speech, i.e. preserving integrity of the ballot and protecting the rights of voters.

B. TENN. CODE ANN. § 2-7-111 (SUPP. 1990) IS NARROWLY TAILORED TO SERVE SUBSTANTIAL STATE INTERESTS.

The second part of the Court's inquiry into whether § 2-7-111 is a reasonable time, place, and manner regulation is whether the statute is narrowly tailored to serve a substantial state interest. *City of Renton*, 475 U.S. at 47; *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2753 (1989); *U.S. v. Grace*, 461 U.S. 171, 177 (1983). Although, the interest need not be a compelling one, it is in this case.

More importantly, § 2-7-111 is narrowly tailored to serve substantial state interests.

As previously stated, this Court has found that the preservation of the integrity of the electoral process is an interest "of the highest importance." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) and "indisputably . . . compelling . . . " *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013, 1024 (1989).[10] More specifically, in *Mills v. Alabama*, 384 U.S. 214, 218 (1966) this Court indicated that a state had the power "to regulate conduct in and around the polls in order to maintain peace, order and decorum there," although the extent of that power was not discussed.

Tennessee law also recognizes that the interests in the freedom and purity of the ballot and in encouraging citizens to exercise their constitutional right to vote are of the highest order. The Tennessee Constitution itself authorizes the General Assembly to enact laws "to secure the freedom of elections and the purity of the ballot box." Tenn. Const., art. IV, § 1 (1870). The Tennessee Supreme Court, in the context of upholding the Tennessee Campaign Financial Disclosure Act of 1980 against a challenge based on the First Amendment, indicated "[t]hat the

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[10] Lower federal courts have also recognized the importance of this interest. *See* e.g. *Clean-Up '84 v. Henrich*, 759 F.2d 1511, 1514 (11th Cir. 1985) ("We recognize that the state has a significant interest in protecting the orderly functioning of the election process."); *National Broadcasting Co., Inc. v. Cleland*, 697 F.Supp. 1204, 1211 (N.D. Ga. 1988) ("the State's espoused interest in maintaining the sanctity and decorum of the polls and in encouraging the use of the franchise is a compelling one.")

State's interest is compelling is shown by the State's Constitutional provisions protecting the integrity and fairness of the election process." *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 904 (Tenn. 1987), *app. dismissed* 485 U.S. 930, *reh'g. denied* 485 U.S. 1029 (1988).

Tenn. Code Ann. § 2-7-111 is intended to and in fact does serve these very significant state interests. The purpose of Tennessee's Election Code is "to regulate the conduct of all elections by the people so that: (1) The freedom and purity of the ballot is secured [and] . . . (4) Maximum participation by all citizens in the electoral process is encouraged." Tenn. Code Ann. § 2-1-102(1) & (4) (1985). The Tennessee Supreme Court has recognized that "[t]he integrity of the ballot is jeopardized upon violation of any of the procedural safeguards that the Legislature has included in the election laws. . . . " *Emery v. Robertson County Election Comm'n*, 586 S.W.2d 103, 109 (Tenn. 1979).

Together § 2-1-102(1) and § 2-7-111 evince a concern for the voter as well as a concern for the integrity of the electoral process. In order to exercise his or her fundamental right to vote, the voter must go to a designated polling place on a designated day during designated hours. *See* Tenn. Code Ann. §§ 2-3-101 (Supp. 1990), 2-3-201-205 (1985). Voters are, there'ore, even more of a "captive audience" than the public transportation riders in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, this Court found that a city could refuse to accept political advertisements for the available advertising spaces on its public transportation system. The fact that the audience was a captive one clearly influenced the opinion. "The streetcar audience is a captive audience. It

is there as a matter of necessity, not of choice." *Id.*, at 302, quoting *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

While this Court has recognized that individuals are not captives everywhere, *Frisby v. Schultz*, 108 S.Ct. 2495 (1988), it has recognized that unique circumstances may leave an individual with no ready means of avoiding unwanted speech. Because individuals may only vote at one location and within certain hours, voters walking into a polling entrance are truly captives. In the absence of some regulation on electioneering, their only options are to simply not exercise their constitutional right to vote or to face a crowd surrounding the entrance.

The record also shows that § 2-7-111 serves these state interests of highest importance. Ms. Alexander testified that an altercation between a voter and an intoxicated poll watcher has occurred at a polling place. (Jt. App. at 39). Absent the one hundred foot limit, there would be "total havoc." (Jt. App. at 39). People would be campaigning inside the polling place, (Jt. App. at 40, 46), inhibiting election officials' ability to conduct the election in the proper manner, (Jt. App. at 40, 46) and obstructing an accurate vote count. (Jt. App. at 46).

Finally, the regulation must be narrowly tailored. *Grace*, 461 U.S. at 177. The regulation, however, need not be the least restrictive means of serving the government's interests. *Ward*, 109 S.Ct. at 2757-58. The statute satisfies this standard. In fact, it is the narrow tailoring of the statute that caused the Tennessee Supreme Court to find the statute to be content based. *Freeman*, 802 S.W.2d at

213. The Court was concerned that the statute differentiated between political and non-political speech even though both would cause the same problem. *Id.*

The Tennessee Supreme Court's view is indistinguishable from the respondent's argument in *City of Renton* that the ordinance was underinclusive "in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theatres." *City of Renton*, 475 U.S. at 52. This Court rejected that contention. There was no evidence in the record that other businesses were engaged in or about to engage in similar practices:

> That Renton chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has "singled out" adult theaters for discriminatory treatment. We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955).

Id. at 52-53.

Testimony at trial indicated that Ms. Alexander was not aware of any incidents of a private company or religious denomination distributing literature within the one hundred foot boundary on election day. (Jt. App. at 40). Ms. Freeman admitted that she had never seen a person hand out religious pamphlets or solicit money for a religious organization at a polling place. (Jt. App. at 30-31). Moreover, she had only a vague memory of seeing

a commercial solicitation on one occasion at a polling place. (Jt. App. at 30). There is absolutely no basis on this record to assume that the Tennessee General Assembly will not take appropriate action if nonpolitical solicitations should become a problem around polling places on election day.

It is evident from the record that § 2-7-111 deals with a problem, "electioneering" at polling places on election day, that is peculiar to one time, election day, and one type of place, polling places. Indeed, only small parcels of real estate for twelve hours a day, one to four days a year are involved. The statute is narrowly tailored to deal with the activity that is the source of the problem. The interests it serves, preserving the integrity of the election process and maximizing voter participation, are of the highest importance.

C. TENN. CODE ANN. § 2-7-111 (SUPP. 1990) LEAVES OPEN AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION.

The final part of the Court's inquiry into whether § 2-7-111 is a reasonable time, place, and manner regulation is whether the statute leaves open ample alternative channels of communication. *Ward*, 109 S.Ct. at 2760. The mere fact that a regulation may reduce the potential audience for an individual's speech "is of no consequence," when there is no showing that the remaining avenues of communication are inadequate. *Id.*

At trial, Ms. Freeman testified that the one hundred foot boundary in certain instances "would exclude part of [her] ability to reach or talk to some people." (Jt. App. at

24). Yet, Ms. Freeman admitted that she has solicited voters outside the 100 foot boundary at polling places for 17 years. (Jt. App. at 18 and 29-30). Apparently, she desires a last chance to influence every voter who casts his or her vote at a particular polling place.

Although "[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention," *Kovacs v. Cooper*, 336 U.S. 77, 87, *reh'g denied* 336 U.S. 921 (1949) (Reed, J., plurality), campaign workers are not free from all regulations. In the *Kovacs* case, this Court upheld an ordinance banning the use of sound trucks on city streets or in public places. *Id.* at 89. Justice Reed wrote: "That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open." *Id.* at 88-89. Implicit in this principle is the notion that there does not exist the right to solicit every single voter every day and everywhere.[11] All that is necessary is for a reasonable opportunity to exist to communicate with voters in general. Such an opportunity is present in this case.

Even where a voter may park a vehicle within the one hundred foot boundary, the voter may meet with campaign workers soliciting votes beyond that boundary.

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[11] In the *Piper* case, the district court rejected the plaintiff's contention that he "had an absolute right to speak to potential voters at any location." *Piper*, 319 F. Supp. at 910.

(Jt. App. at 42). Also, even where the entire grounds of the polling place are within the one hundred foot boundary, the record reflects that there have been no problems with people campaigning beyond the boundary. (Jt. App. at 42). The trial court found that Ms. Freeman had "alternate channels to exercise her speech." (Petition for Writ of Certiorari, Appendix at 6a). Since the statute was found to be content-based this finding was not addressed by the Tennessee Supreme Court.

Just as in *City of Renton*, where this Court held the First Amendment required "only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, . . . " *City of Renton*, 475 U.S. at 54, it is perfectly clear that campaign workers who wish to solicit votes have ample channels in which to exercise that right. Indeed this Court found 520 acres or five percent of the City of Renton's land available for adult theaters was an ample alternate channel of communication. *Id.* at 53-54. Here, Ms. Freeman has 562 square miles of Davidson County except the 100 foot radius of entrances to the 164 polling places to solicit votes on election day.

II. TENN. CODE ANN. § 2-7-111 (SUPP. 1990) IS THE LEAST RESTRICTIVE MEANS OF ACCOMPLISHING THE STATE'S COMPELLING INTERESTS IN PRESERVING THE INTEGRITY OF THE BALLOT AND PROTECTING THE RIGHTS OF VOTERS.

Even if this Court measures the 100 foot boundary law against the higher standard of strict scrutiny, § 2-7-111 still passes constitutional muster. It cannot be

disputed that the statute is designed to serve the compelling state interests of preserving the integrity of the ballot and protecting the rights of the voters. Even the Tennessee Supreme Court agreed that the "State unquestionably has shown a compelling interest in banning solicitation of voters or distribution of campaign materials *within the polling place itself.*" *Freeman*, 802 S.W.2d at 213 (emphasis supplied in original). *See also Bellotti*, 435 U.S. at 788-89 (preserving integrity of electoral process of "highest importance"); *Eu*, 109 S.Ct. at 1024 (such an interest is "indisputably compelling").

Although such compelling interests were acknowledged, the Tennessee Supreme Court erroneously concluded that the 100 foot boundary was not the least restrictive means of accomplishing those interests. In particular, the Tennessee high court pointed to two alternatives which it considered less intrusive on free speech while still advancing the state's compelling interests: (1) criminal laws in Tennessee prohibiting voter interference or intimidation[12] adequately serve the state's interests,

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[12] Tenn. Code Ann. § 2-19-115 (1985) makes it a misdemeanor for any person: "(1) By force or threats to prevent or endeavor to prevent any elector from voting at any primary or final election; (2) To make use of any violence, force or restraint, or to inflict or threaten the infliction of any injury, damage, harm or loss; Or (3) In any manner to practice intimidation upon or against any person in order to induce or compel him to vote or refrain from voting, to vote or refrain from voting for any particular person or measure, or on account of such person having voted or refrained from voting in any such election."

Freeman, 802 S.W.2d at 214; or (2) a 25 foot boundary line "might pass constitutional muster." *Id.*

The following testimony of Ms. Alexander refutes the assertion that criminal laws prohibiting voter interference or intimidation adequately serve the state's interest:

> Q. Do you think that those [intimidation and interference] statutes would be sufficient to take care of the problems that would be created by the chaos and confusion that you said would occur?
>
> A. No, I do not. It would take care of a portion of it, and that is the intimidation and interference. But as far as the poll officials being able to operate under the manner that they should, and get the vote count in the manner in which they should, or conduct the election in the manner in which they should, I do not feel that it would be – that it would cover that.

(Jt. App. at 46). Moreover, just as the existence of bribery laws did not mean that campaign funds limits were not needed in *Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976), the existence of penalties for some conduct such as intimidation and interference with voters does not make other regulations such as the 100 foot boundary unnecessary.

Additionally, the interference and intimidation laws are after-the-fact enforcement mechanisms. *See* Tenn. Code Ann. § 2-7-103(c) (1985) (no policeman or law enforcement officer may come within 10 feet of the entrance of a polling place except upon request of an election official to make an arrest or to vote). The Tennessee Supreme Court's view that the state's interest is nothing more than protecting voters from "annoying

campaign workers armed with cheap ball point pens and fingernail files embossed with a candidate's name," *Freeman*, 802 S.W.2d at 214, ignores the reality that during heated elections violence can occur, i.e. altercations between voters and intoxicated poll watchers. (Jt. App. at 39). Furthermore, the State of Tennessee is not constitutionally required to wait until intimidation of or interference with a voter occurs at a polling place to protect against such occurrences. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("[l]egislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.")

Likewise, the reduction of the 100 foot boundary to 25 feet is not a less restrictive alternative because it is a difference in degree not kind. In *Buckley*, this Court refused to hold a $1,000 limit on campaign contributions was too low stating:

> A second, related overbreadth claim is that the $1,000 restriction is unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder, especially in campaigns for statewide or national office. While the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns, Congress' failure to engage in such fine tuning does not invalidate the legislation. As the Court of Appeals observed, "[i]f it is satisfied that some limit on contributions is necessary, a court has

> no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." 171 U.S.App.D.C., at 193, 519 F.2d, at 842. Such distinctions in degree become significant only when they can be said to amount to differences in kind.

Buckley, 424 U.S. at 30. The fallacy of reducing the 100 foot boundary to 25 feet is best summarized by Justice Fones in his dissent:

> The majority says that somewhere in the space of 75 feet a ban on vote solicitation becomes unconstitutional. It takes approximately 15 seconds to walk 75 feet. If the electorate of Tennessee is dependent upon the free speech available in the last 15 seconds before they enter the polling place, to cast an informed ballot, God help us.

Freeman, 802 S.W.2d at 215.

III. SINCE THE LAND WITHIN THE 100 FOOT BOUNDARY ON ELECTION DAY IS NOT A PUBLIC FORUM, TENN. CODE ANN. § 2-7-111 (SUPP. 1990) SHOULD BE UPHELD AS A REASONABLE REGULATION.

The area within the 100 foot boundary on election day is not a public forum; therefore, § 2-7-111 should be upheld as a reasonable regulation. In *Kokinda*, Justice O'Connor, in a plurality opinion, set forth the following tripartite framework for determining how First Amendment interests are to be analyzed with respect to government property:

> Regulation of speech activity on government property that has been traditionally open to the public for expressive activity, such as

> public streets and parks is examined under strict scrutiny. [citation omitted] Regulation of speech on property that government has expressly dedicated to speech activity is also examined under strict scrutiny. [citation omitted] But regulation of speech activity where the government has not dedicated its property to First Amendment activity is examined only for reasonableness.

Kokinda, 110 S.Ct. at 3119-20 (O'Connor, J., plurality). *See also Perry Education Assn.*, 460 U.S. at 45-46. In determining whether a publicly-owned sidewalk constitutes a public forum, the critical issue is "the location and purpose of the sidewalk . . . . " *Id.* at 3121. *See also United States v. Grace*, 461 U.S. at 179-80.

Polling places in Tennessee are designated by the county election commissions with each polling place to be in the election precinct it is to serve. Tenn. Code Ann. § 2-3-101 (Supp. 1990). Thus, as a practical matter, polling places and their surrounding grounds can vary in location from government property such as public schools and other government buildings to private property such as churches or private businesses. *See* Tenn. Code Ann. § 2-3-107(b)(1)(c)(1985) (county election commissions are encouraged to use public buildings, but may use private buildings when public buildings are unavailable).

The sole purpose of the use of a polling place and its surrounding grounds on election day is to conduct an election. As in *Kokinda*, the State "has not expressly dedicated its sidewalks to any expressive activity . . . " on election day. *Kokinda*, 110 S.Ct. at 3121. In fact, § 2-7-111 provides that "[t]he officer shall measure off 100 feet from the entrances to the building in which the election is to be held and place boundary signs at that distance." Thus,

election officials are explicitly directed to mark the land 100 feet from the entrance to the polling place as prohibiting electioneering. Just as postal patrons walking on the sidewalk leading to a post office are there to transact business only, persons entering the clearly marked 100 foot boundary on election day are there only to vote. Thus, the land within the 100 foot boundary of a polling place is not a public forum on election day.

The fact that commercial and religious solicitations are not prohibited by § 2-7-111 does not mean that polling place grounds are converted into a public forum. In *Kokinda*, Justice O'Connor rejected the defendant's argument that the Postal Service's permitting certain types of speech rendered the property a public forum stating that "a practice of allowing some speech activities on postal property do[es] not add up to the dedication of postal property to speech activities." *Id*. In this case, religious and charitable speech are not explicitly permitted by the statute, rather such activity is neither permitted nor prohibited because it rarely if ever occurs. (Jt. App. at 30, 40). The State of Tennessee has not expressly dedicated land within 100 feet of a polling place on election day as a public forum. In fact, § 2-7-111 does just the opposite by dedicating such land to be free of electioneering while at the same time establishing a public forum outside the 100 foot boundary for political campaign solicitors.

Once it is established that the land within the 100 foot boundary of a polling place is a non-public forum, there can be little doubt that the regulation is reasonable. As previously argued in this brief, the purpose and effect of the 100 foot boundary is to ensure the integrity of the election process and protect citizens about to exercise

their right to vote. Both of these goals are furthered by the 100 foot boundary in its prevention of confusion, congestion, delay, and intimidation in and around the polling place on election day.

CONCLUSION

Based upon the foregoing authorities and analysis, the petitioner asks this Court to reverse the decision of the Tennessee Supreme Court and hold that § 2-7-111 does not violate the Free Speech Clause of the First Amendment because it is a reasonable time, place, and manner regulation.

Respectfully submitted,

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APPENDIX

CHAPTER NO. 85

HOUSE BILL NO. 23

(By Bragg, Stanley)

SUBSTITUTED FOR: SENATE BILL No. 26

(By Crouch, Pipkin, Ray, Motlow)

AN ACT to amend Section 2-1218, Tennessee Code Annotated, to prohibit distribution of campaign literature in the building where an election is in progress.

Be it enacted by the General Assembly of the State of Tennessee:

SECTION 1. Section 2-1218, Tennessee Code Annotated, is amended by adding the following at the end of said Section: "It shall be a misdemeanor to distribute campaign literature of any nature on the same floor of a building, or within one hundred (100) feet thereof, where an election is in progress."

SECTION 2. This Act shall take effect September 1, 1967.

Passed: April 13, 1967.

JAMES H. CUMMINGS,
Speaker of the House of Representatives.

FRANK C. GORRELL,
Speaker of the Senate.

Approved: April 19, 1967.

BUFORD ELLINGTON,
Governor.

AN ELECTIONS ACT
RECOMMENDED TO THE
EIGHTY-SEVENTH GENERAL ASSEMBLY
BY THE LAW REVISION COMMISSION
WITH SECTION-BY-SECTION COMMENTS

LAW REVISION COMMISSION
STATE OF TENNESSEE
1105 SUDEKUM BUILDING
NASHVILLE, TENNESSEE 37219

Grayfred B. Gray
Executive Director
January, 1972

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[p. 83] CHAPTER 7. PROCEDURE AT THE POLLING PLACE

This Chapter is a comprehensive statement of rights and duties at polling places. With minor exceptions, it sets forth the duties of all election officials at the polling place.

It is written in the light of the titles for the various election officials set forth in Chapter 4. Each office is distinct both in name and in responsibilities.

Consistent with the thrust of the entire revision, it provides the procedure for all kinds of elections and regardless of whether voting machines are used or not. It should be liberally construed to provide for expeditious elections which are free of fraud and unnecessary burdens on voters.

This Chapter is organized in several parts for ease of use. They are:

GENERAL RIGHTS AND DUTIES
OPENING THE POLLS
THE VOTING PROCESS
DUTIES AFTER CLOSING THE POLLS

GENERAL RIGHTS AND DUTIES

701. The Officer of Elections is in charge of and responsible for the conduct of all the elections being held at the polling place where he is the Officer of Elections. He is subject to the direction of the County Election Commission in the performance of his duties.

The Officer of Elections shall:

(a) Maintain order at the polling place;

(b) Assure that voting machines and voting compartments are arranged in such a way that the secrecy of the ballot is preserved and that no voter, on entering the polling place, comes near the voting machines or ballot boxes before his eligibility to vote has been determined;

(c) Keep each voting compartment provided with proper supplies for marking the ballots;

(d) Have persons who are waiting to vote stand in line so that no person who is waiting is standing nearer than ten (10) feet to any voting machine or ballot box;

(e) Report the breakdown of any voting machine to the machine custodian; and

[p. 84] (f) Insure that each other election official performs his duties.

Derivation

T.C.A. 2-1217, 1218, and 1534.

Comment

This section establishes the Officer of Elections as the single election official who is responsible for the conduct of elections, primary and general, at his polling place. Contrary to much current practice, however, he is made squarely answerable to the County Election Commission at all times.

702. During the time for voting the judges shall distribute paper ballots, decide challenges to voters, serve in place of other election officials as directed by the Officer of Elections, and assist the Officer of Elections in such ways as he may direct.

Derivation

T.C.A. 2-814 and 1518.

Comment

This section broadens the role of judge into that of assistant of the Officer of Elections while preserving certain distinct roles for judges, individually or jointly. The present law's use of judges as machine operators is rejected except to the extent that the Officer may direct a judge to substitute for a machine operator. The judges have the responsibility for paper ballots and deciding challenges, leaving the Officer free to perform his broader duties.

703. No person may be admitted to a polling place while the procedures required by this Chapter are being carried out except election officials, voters, persons properly assisting voters, the press, poll watchers appointed under section 704 and others bearing written authorization from the County Election Commission. Candidates may be present after the polls close. No policeman or other law enforcement officer may come nearer to the entrance to a polling place than ten (10) feet or enter the polling place except at the request of the Officer of Elections or the County Election Commission or to make an arrest or to vote.

No person may go into a voting machine or a voting booth while it is occupied by a voter except as expressly authorized by this title.

Derivation

T.C.A. 2-1217, 1223, 1224, 1520, 1533, and 2206.

Comment

A chronic problem at the polls appears to be the presence of people who need not be there. This creates

confusion and opportunity for misconduct. Therefore this section bars people from being inside polling places except for those people who have a [p. 85] reason to be there. Candidates are barred because it is impractical to ask that they not campaign if they are let in.

To protect the secrecy of the ballot people are barred from entering voting machines or booths while they are occupied.

704. (a) Each political party and any organization of citizens interested in a question on the ballot or interested in preserving the purity of elections and in guarding against abuse of the elective franchise may appoint poll watchers. The County Election Commission may require organizations to produce evidence that they are entitled to appoint watchers. Each candidate in primary elections and each independent candidate in general elections may appoint one (1) poll watcher for each polling place. All appointments of watchers shall be in writing and signed by the persons or organizations authorized to make the appointment. A citizens' organization shall submit a list of the names of its poll watchers to the County Election Commission no later than noon of the day before the election.

(b) Each political party which has candidates in the election and each citizens' organization may have two (2) watchers at each polling place. One of the watchers representing a party may be appointed by the Chairman of the County Executive Committee of the party and the other by a majority of the candidates of that party running exclusively within the county in which the watchers are appointed. If the candidates of a party fail to appoint the watchers by noon on the third day before the election, the

Chairman of the County Executive Committee of the party may appoint both watchers representing his party.

(c) Upon arrival at the polling place a watcher shall display his appointment to the Officer of Elections and sign the register of watchers. Poll watchers may be present during all proceedings at the polling place governed by this Chapter. They may watch and inspect the performance in and around the polling place of all duties under this Title. A watcher may, through the judges, challenge any person who offers to vote in the election. A watcher may also inspect all ballots while being called and counted and all tally sheets and poll lists during preparation and certification.

[p. 86] If a poll watcher wishes to protest any aspect of the conduct of the election, he shall present his protest to the Officer of Elections or to the County Election Commission or an inspector. The Officer of Elections or County Election Commission shall rule promptly upon the presentation of any protest and take any necessary corrective action.

(d) No watcher may interfere with any voter in the preparation or casting of his ballot or prevent the election officials' performance of their duties. No watcher may observe the giving of assistance in voting to a voter who is entitled to assistance. Watchers shall wear poll watcher badges with their names and their organization's name but no campaign material advocating voting for candidates or positions on questions.

Derivation

T.C.A. 2-817 and 1110.

Cross-References

Challenge procedure, see §§723-726
Electioneering, see §711.

Comment

This section adds to the traditional poll watchers representing parties and candidates by authorizing other organizations to have watchers. This is provided for consistency in non-partisan elections and elections on questions as well as to reach for all elections such organizations as the League of Women Voters which have an interest in the purity of elections.

Subsection (c) clarifies the procedures for and rights of poll watchers, including their right to be present from the arrival of election officials to their departure after performing their duties. Since their presence is to assure confidence in the fairness of the elections and to preserve grounds of contest, they are free to observe and to inspect the performance of the election officials' duties. To do this they are free to go about in the polling place.

Subsection (c) squarely directs poll watchers to present their complaints to the Officer of Elections instead of getting into disputes with the other officials. If the watcher wishes, he can present his complaint to the Commission directly or to an inspector if one is present.

Watchers are subject to several limitations set out in sub-section (d). In particular they are not to interfere with voters. Thus, while they may challenge voters, this must be done entirely through the judges. They may not interfere with the election officials' performance of their duties in such a way as to prevent the performance. Some minimal interference is, of course, inherent in close observation.

Consistent with section 711 which is intended to keep electioneering activity away from the polling place, the

watchers are barred from wearing things such as buttons or hats which are campaign material. To identify them to voters who may have some complaint they wear a badge naming their party or other organization. The effect of this section and section 711 is to bar all campaign activities or candidate identification from the immediate vicinity of the polling place except that voters are not barred from bringing in campaign materials which they may want to use to assist them in casting their votes.

[p. 87] OPENING THE POLLS

705. The election officials of each polling place shall meet at the polling place at least one-half (1/2) hour before the time for opening the polls for the election.

If any election official fails to appear at the polling place, the Officer of Elections or, in his absence, a majority of the election officials attending shall select other persons to fill the vacancies. The persons selected shall be registered voters at the polling place for which they are to serve. Any person selected to fill a vacancy shall be, to the extent practicable, of the same political party as the person in whose place he was selected. The Officer of Elections or, in his absence, the oldest election official in age who has taken the oath shall administer the oath of section 112 to the persons filling vacancies and to any other official who has not taken the oath. The Officer of Elections shall notify the County Election Commission of all vacancies. Persons appointed to vacancies shall be compensated at the same rate as others preforming the job to which they are appointed.

Derivation

T.C.A. 2-809, 1101, 1102, 1104, 1105, and 1216.

Comment

This is substantially the present law. Consistent with broadening the Officer of Elections' responsibilities, he is to choose replacements under the limitations imposed by the section.

706. If the County Election Commission receives notice that no election officials are at the polling place, the Commission shall promptly appoint new officials who shall conduct the election. Until the polling place is open for voting, any voter who is eligible to vote there may vote at the County Election Commission office; ballots cast under this sentence shall be counted by the County Election Commission.

Derivation

T.C.A. 2-809, 1103 and 1229.

Comment

The failure of all election officials to serve is rare, but the present law does cover it. T.C.A. 2-1229 makes the Chairman of the County Election Commission responsible for holding the election if the Officer of Elections does not arrive. If no election official arrives, a Justice of the Peace or three property owners may appoint officials or the property owners may conduct the election under [p. 88] T.C.A. 2-1103. For primaries the voters appoint officials under T.C.A. 2-809. All of these are highly impractical. The Chairman has other things to do. The voters, if no officials arrive, have neither registration books nor ballots nor voting machine keys.

This draft places the responsibility on the County Election Commission to immediately re-staff the polling place. To avoid the possibility of depriving the voters of time to vote, the voters are authorized to vote at the County Election Commission office until the polling place is in operation. The commission office contains everything necessary to conduct the election.

707. The Officer of Elections shall deliver to the polling place on the day of the election the duplicate permanent registration records, paper ballots, sample ballots, voting machine keys, ballot boxes and keys, and all other supplies needed for the conduct of the election.

Derivation

T.C.A. 2-315, 814, 1214, and 1515

Comment

This section transfers to the Officer of Elections the responsibility for delivering all the materials necessary for the election. Under present law they are the responsibility of officers, judges and registrars. The practice varies from county to county.

708. (a) If the ballots for a polling place are lost, stolen or destroyed or are not delivered to the polling place or the supply of paper ballots is insufficient for any reason, the Officer of Elections shall notify the County Election Commission immediately after learning of this fact. The Commission shall provide replacements for the missing or destroyed ballots by delivering the ballots reserved under section 515 and by having such additional ballots prepared as may be necessary.

(b) If paper ballots or voting machines or both are delivered to the wrong polling place, the Officer of Elections shall notify the County Election Commission upon discovery of the error. The Commission shall immediately have the proper ballots or voting machines delivered. Pending the arrival of the correct voting machines, the Officer of Elections shall proceed under section 719 as if the machines were out of order.

(c) At the close of the polls the Officer of Elections shall make a written report of the circumstances causing his action under this section to the County Election Commission [p. 89] which may make additions to the report and shall then transmit it to the grand jury of the county.

Derivation

T.C.A. 2-1215 and 1521.

Comment

Present law requires the registrars at a polling place to make up paper ballots to replace stolen, destroyed or undelivered ballots. The judges replace ballot labels on voting machines. Subsection (a) places this responsibility on the County Election Commission and requires the use of ballots which the Commission holds in reserve under this draft. This avoids the dangers of on the spot ballot making.

Subsection (b) is new, but it merely authorizes the use of that common sense calls for. The use of paper ballots pending the arrival of voting machines is new and is intended to avoid having to require voters either to wait for long times or to return to the polling place later in the day.

The loss or destruction of ballots is a serious matter which may raise questions of misconduct. Therefore, a written report and grand jury consideration are required.

709. The Officer of Elections shall show the ballot box to the judges who shall verify that it is empty, and the Officer shall then lock the ballot box before the polling place is open for voting. The ballot box shall remain locked until the votes are to be counted after voting has ended.

Derivation

T.C.A. 2-1305.

Comment

The requirement of examination of the ballot boxes by the judges is new.

710. (a) The Officer shall give the sealed voting machine keys to the judges to prepare the machines for voting. The envelope containing the keys may not be opened until the judges have examined it to see that it has not been opened and that the number registered on the protective counter and the number on the seal with which the machine is sealed correspond with the numbers written on the envelope containing the keys.

(b) If the envelope has been torn open, or if the numbers do not correspond, or if any other discrepancy is found, the judges shall immediately inform the voting machine custodian of the facts. The custodian or his assistant shall promptly examine the machine and certify whether it is properly arranged.

[p. 90] (c) If the number on the seal and the protective counter are found to agree with the numbers on the envelope, the judges shall then open the door concealing the counters and carefully examine every counter to see that it registers zero (000) and shall also allow the watchers to examine them. The judges shall then sign a certificate showing the delivery of the keys in a sealed envelope, the number on the seal, the number registered on the protective counter, that all the counters are set at zero (000), and that the ballot labels are properly placed in the machine.

(d) If any counter is found not to register at zero (000) and if it is impracticable for the custodian to arrive in time to adjust the counters before the time set for

opening the polls, the judges shall immediately make a written statement of the designating letter and number, if any, of such counter together with the number registered thereon and shall sign and post the statement on the wall of the polling place where it shall remain throughout the election day. In filling out the tally sheets they shall subtract such number from the number then registered on such counter.

Derivation

T.C.A. 2-1517.

Comment

Other than changes as to which officials do certain things this section is the same as the present law.

711. The Officer of Elections shall have the sample ballots, voting instructions, and other materials which are to be posted placed in conspicuous positions inside the polling place for the use of voters. The Officer shall measure off 100 feet from the entrances to the building in which the election is to be held and place boundary signs at that distance.

Within the 100 foot boundary and the building in which the polling place is located display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building or on the grounds of any building in which a [p. 91] polling place is located. The Officer of Elections shall have each official wear a badge with his name and official title.

Derivation

T.C.A. 2-1218 and 1516.

Cross-References

Arrangement of polling place, see §313.

Comment

This section imposes on the Officer of Elections the general responsibility for posting materials in the polling place. The posting of boundary signs for electioneering is new. This is a chronic problem for both election officials and campaign workers.

The present law prohibits electioneering with 100 feet, but it is not clear what the 100 feet is measured from. This section makes it clear that measurement is from the entrances to the building. This creates a 100 foot radius from each entrance which will be free of electioneering. This section also deals with a problem not clearly covered by the present law, the posting of signs on buildings and grounds where polling places are located. The goal is to make the site of polling places as neutral as is reasonably possible. The only legal way any kind of election materials may get into a polling place under this draft is as an aid to a voter who brings them in for himself.

THE VOTING PROCESS

712. (a) A voter shall sign an application for ballot, indicate the primary he desires to vote in, if any, and present it to a registrar. The registrar shall compare the signature and information on the application with the signature and information on the duplicate permanent registration record. If, upon comparison of the signature and other identification, it is found that the applicant is entitled to vote, the registrar shall sign his initials on the application and shall note on the reverse side of the voter's duplicate permanent registration record the date of the election, the

number of the voter's ballot application, and the elections in which he votes. If the applicant's signature is illegible, the registrar shall print the name on the application. The registrar shall give the voter the ballot application which is the voter's identification for a paper ballot or ballots or for admission to a voting machine. The voter shall then sign the duplicate poll lists without leaving any lines blank on any poll list sheet.

If the identity of the applicant does not compare with the permanent registration records or he otherwise appears ineligible to vote, the registrar shall tell the applicant he is not eligible to vote. If the applicant still claims that he is eligible, the [p. 92] registrar shall challenge the voter and act thereafter on the decision of the judges. The applications for ballots of those persons whose votes are rejected shall be filed in numerical order.

(b) If a voter is so disabled that he cannot write his signature or make his mark, the register shall write his name for him where needed and shall indicate that he has done so by putting his initials immediately after the name.

Derivation

T.C.A. 2-315 and 1222.

Cross-References

Application for ballot form, see §522(b).
Challenge of voter, see §§723-726.

Comment

This is substantially the present procedure except that the ballot application serves under this section as both application and in place of the old ballot ticket. If the registrar finds the voter ineligible and the voter

insists on voting, the registrar challenges the voter and abides by the decision of the judges.

Consistent with the focus of this Chapter on accurate records the applications of rejected voters are preserved separately by the registrars.

Under the present law the clerks keep the poll lists. Since the clerks are eliminated under this draft, each registrar will have a poll list to be signed by the voter. The carbonized poll lists mean the voter will only need to sign once so that the process will not be impeded. The poll lists will also have the new benefit of paralleling the breakdown of the duplicate permanent registration records.

713. When the voter is to vote by voting machine, he shall then present his ballot application to the machine operator, enter the machine, and vote by marking the ballot and operating the machine. The machine operator shall file the ballot applications in order of presentation and shall permit the voter to operate the machine for those elections in which he is entitled to vote. The machine operator shall, upon demand of any voter before he enters the machine, tell the voter the order of the offices on the ballot and fully instruct the voter on how to operate the machine.

Derivation

T.C.A. 2-1519

Comment

The machine operator preserves the ballot applications as presented to him under this section. Otherwise this follows present law.

714. (a) When the voter is to vote by paper ballot, he shall then present his ballot application to the judge who is in charge of [p. 93] paper ballots. The judge shall write the

ballot number of each ballot the voter is entitled to on the ballot application, give the ballot or ballots to the voter, and give the ballot application to the judge who is assigned to deposit ballots in the ballot box. The judge shall, upon demand of any voter at the time his ballot is handed to him, tell the voter the order of the offices on the ballot.

(b) The voter shall then go to one of the voting compartments and shall prepare his ballot by making in the appropriate place a cross (x) or other mark opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate of his choice in the blank space provided and making a cross (x) or other mark opposite it, and by making a cross (x) or other mark opposite the answer he desires to give on each question. Before leaving the voting compartment, the voter shall fold his ballot so that his votes cannot be seen but so that the information printed on the back of the ballot and the numbered stub are plainly visible.

(c) The voter shall state his name and present his folded ballot to the judge assigned to receive and deposit the ballots. The judge shall compare the ballot number on the stub with the ballot number on the voter's ballot application. If the ballot numbers are the same, the judge shall tear off and destroy the stub and deposit the ballot in the ballot box unless the voter is successfully challenged. The judge shall file all ballot applications in the order in which they are given to him.

Derivation

T.C.A. 2-1216, 1218, 1219, 1220, 1221, 1223, 1307, 1308, 1316, and 1533.

Comment

This procedure is simplified from the present law but is along the same lines. The responsibility for paper ballots is given entirely to the judges. The procedure parallels and is compatible with the use of voting machines. The procedure will be used for paper ballots both with and without voting machines.

715. (a) A voter may vote only in the precinct where he resides and is registered, but if a registered voter has, within ninety (90) days before an election, changed his residence to another [p. 94] place inside Tennessee but outside the precinct where he is registered or changed his name by marriage or otherwise, he way vote in the polling place where he is registered.

(b) A registered voter is entitled to vote in a primary election for offices for which he is qualified to vote at the polling place where he is registered

(1) If he is a bona fide member of and affiliated with the political party in whose primary he seeks to vote, or

(2) If, at the time the seeks to vote, he declares his allegiance to the political party in whose primary he seeks to vote and states that he intends to affiliate with that party.

He shall indicate on which basis he is voting in his application for a ballot.

Derivation

T.C.A. 2-202, 203, 204, 304, 815 and 816.

Comment

T.C.A 2-203 also authorizes judges and participants in judicial proceedings, certain candidates, and rural mail carriers to vote where they are on election day. These

authorizations have been deleted as obsolete. They are of questionable validity in any event to the extent that they authorize voting where a person is not a resident.

Subsection (b) is from present law except for the requirement that the voter indicate the basis of his voting in the primary. The application form in primaries will be easily marked with no significant increase in time taken to complete it. The present law, while requiring party membership under T.C.A. 2-816, provides no way for the voter to show it unless he is challenged. This draft preserves the open primary.

716. A voter who declares that by reason of blindness or other physical disability or illiteracy he is unable to mark his ballot to cast his vote as he wishes and who, in the judgment of the Officer of Elections, is so disabled or illiterate, may:

(a) Where voting machines are used,

(1) Use a paper ballot, or

(2) If he cannot mark a paper ballot as he wishes, have his ballot marked on a voting machine by his spouse, father, mother, brother, sister, son or daughter or by one of the judges of his choice in the presence of either a judge of a different political party, or, if [p. 95] such judge is not available, an election official of a different political party; or

(b) Where voting machines are not used, have his ballot marked by his spouse, father, mother, brother, sister, son or daughter or by one of the judges of his choice in the presence of either a judge of a different political party or, if such judge is not available, an election official of a different political party.

The Officer of Elections shall keep a record of each such declaration, including the name of the voter and of the person marking the ballot and, if marked by a judge, the name of the judge or other official in whose presence the ballot was marked. The record shall be certified and kept with the poll books on forms to be provided by the Coordinator of Elections.

Derivation

T.C.A. 2-1226 and 1519.

Comment

The present law authorizes assistance for disabled and blind voters. This section adds authorization for assistance to illiterates which is now required by federal statute and case law.

To protect the secrecy of the ballot voters are required to vote paper ballots instead of machines if they can use the paper ballots but not voting machines.

To assure that the ballot is marked as the voter wishes and safeguard against fraud the procedure forgiving assistance is changed. Under present law the voter can choose "any reputable person" or the Officer of Elections. This section, to inhibit coercive tactics, restricts the choice to members of the voter's family or to a judge. If a member of the family is chosen, he and the voter alone mark the ballot. If a judge is chosen, a judge of a different political party is present to assure the proper marking of the ballot.

A record must be kept of all assistance to discourage the giving of improper assistance.

717. Where voting machines are used, any voter desiring to cast a ballot for a candidate whose name is not on the voting machine ballot may request a paper ballot to be furnished him by the ballot judge. This request must be

made before operating a voting machine, and a voter after receiving a paper ballot may not enter a voting machine.

Derivation

T.C.A. 2-1207

Comment

This continues present law except that this section permits a voter to obtain a write-in ballot after entering the voting machine if he has not operated the machine. There is no legitimate reason to exclude such a voter from the use of the paper ballot.

[p. 96] 718. No voter who is voting without assistance may remain in a voting machine booth more than two (2) minutes or occupy a voting compartment more than five (5) minutes if other voters are waiting or more than ten (10) minutes in any event. If a voter refuses to leave after his time elapses, the Officer of Elections shall have him removed.

Derivation

T.C.A. 2-1223 and 1520

Comment

Present law.

719. If a voting machine being used in an election becomes out of order, it shall be repaired if possible or another machine substituted as promptly as possible. If repair or substitution cannot be made and other machines at the polling place cannot handle the voters, the paper ballots provided for the poliing place shall be used and, if necessary, ballots shall be provided under section 708.

If a voting machine becomes out of order while it is being used, the crosses (x) shall be cleared from its face

by the names of candidates and by questions. The voter may then vote on another machine or by paper ballot as the judges decide.

Derivation

T.C.A. 2-1522.

Cross-References

Large ballots on two machines, see § 512(c).

Comment

This section adds a procedure to be used if the voting machine breaks down. Generally repairs are to be made. Where there are not enough machines left, paper ballots are to be used. Where the ballot is spread on two machines under section 512(c), the voters will have to be shifted, from both machines to paper ballots if there are only two machines, to preclude double voting for a part of the candidates.

The second paragraph creates a procedure for a common situation, breakdown of an occupied machine, which the present law does not provide for. The judges decide which method the voter will use to enable them to deal with a situation where they are of the opinion that the voter may be deliberately jamming machines.

720. If any voter spoils a paper ballot, he may obtain others, one at a time, not exceeding three (3) in all, upon returning each spoiled one. The spoiled ballots shall be placed in an envelope marked "Spoiled Ballots."

[p. 97] Derivation

T.C.A. 2-1225

Comment

Present law with the addition of preservation of spoiled ballots to prevent fraudulent chain voting.

721. No person may take any ballot from the polling place before the close of the polls. If a voter refuses to give his paper ballot to the judge to be deposited in the ballot box after marking it, the Officer of Elections shall require that the ballot be surrendered to him and shall deposit it in a sealed envelope marked "Rejected" with his name, the reason for rejection, and the Officer's signature.

Derivation

T.C.A. 2-814 and 1225.

Comment

Present law in substance except that the ballot is to be rejected and preserved instead of destroying it.

722. The voting machine operator shall inspect the face of the machine after every voter has voted to ascertain that the ballot labels are in their proper places and that the machine has not been injured or tampered with. He shall remove any campaign literature left in the machine booth. During the election the door or other compartment of the machine may not be unlocked or opened or the counters exposed except by the custodian or other authorized person, a statement of which shall be made and signed by the custodian or authorized person and attached to the returns.

Derivation

T.C.A. 2-1518.

Comment

Present law with the addition of the requirement that the machine operator remove campaign literature from the machine.

723. If any person's right to vote is challenged by any other person present at the polling place, the judges shall present the challenge to the person and decide the challenge after administering the following oath to the challenged voter: "I swear (affirm) that I will give true answers to questions asked about my right to vote [p. 98] in the election I have applied to vote in." If the person refuses to take the oath, he may not vote.

Derivation

T.C.A. 2-1309

Comment

Present law authorizes the judges to decide challenges. This section makes clear that the judges alone handle challenges, and no one else is authorized to interfere directly with the voter. Others must present their challenges to the judges.

724. A person offering to vote may be challenged only on the following grounds:

(a) That he is not a registered voter at the polling place.

(b) That he is not the registered voter under whose name he has applied to vote.

(c) That he has already voted in the election.

(d) That he has become ineligible to vote in the election being conducted at the polling place since he registered.

The judges may ask any question which is material to deciding the challenge and may put under oath and ask questions of such persons as they deem necessary to their decision. The judges shall ask the registrar-at-large to check the original permanent registration records if the

voter claims to be registered but has no duplicate permanent registration record.

Derivation

T.C.A. 2-1310 and 1312; Cal. Elections Code § 14240.

Comment

This is substantially the present law except that it bars a redetermination of the voter's eligibility to register. Since the purpose of the registration is to determine in advance whether a person is a qualified voter, that determination is not open on election day except with respect to matters arising after registration. Other grounds for challenge are enumerated. T.C.A. §§ 2-1313 through 1315 dealing with naturalized voters are deleted as obsolete. The decision on a naturalized voter is to be made when he registers.

725. If the judges determine unanimously that the person is not entitled to vote, he shall vote by paper ballot and his ballot shall be deposited in a sealed envelope marked "Rejected" with his name, the reason for rejection, and the signatures of the judges written on it. If the judges do not agree unanimously to rejection, the person shall be permitted to vote as if unchallenged. In either case the challenge and outcome shall be [p. 99] noted on the back of the voter's duplicate permanent registration record and on the poll lists.

Derivation

T.C.A. 2-1311

Comment

This section requires unanimity among the judges to reject a voter whereas a majority can do so under the present law. This section provides a procedure for preserving rejected ballots so that they are available if there

is an election contest. The present law has no such procedure since the voter is not permitted to vote at all. The record of the challenge can be the basis for an investigation by the County Election Commission into any reports of improprieties in the election, including claims that persons voted who were not qualified to do so.

726. A person offering to vote in a primary may also be challenged on the ground that he is not qualified under section 715(b). Such a challenge shall be disposed of under the procedure of sections 723 through 725 by the judge or judges and the other election officials of the party in whose primary the voter applied to vote to a total of three to decide the challenge.

Comment

This new section requires that a challenge on the basis that the voter is not eligible under section 715(b) on party membership be decided only by election officials who are members of the party having the primary election.

727. At the time set for the closing of the polling place the Officer of Elections shall place one of the election officials at the end of the line of persons waiting to vote. No other person may then get in line to vote. The polls shall be closed as soon as all persons in the line ahead of the election official have voted regardless of when the polls opened.

Derivation

T.C.A. 2-1301

Comment

This is substantially the present law with the addition of what is now the practice in some places, that is, using an election official to close off the end of the line of persons eligible to vote.

DUTIES AFTER CLOSING THE POLLS

728. The registrars shall, immediately after the polls close, cross (x) out the remaining space on incomplete poll list sheets so that no additional names can be written in and shall number those sheets serially and place them in the poll book binders.

[p. 100] Derivation

T.C.A. 2-1321

Comment

The present law requires marking out blank spaces. This section adds numbering of the pages to prevent addition of names.

729. Immediately after the polls close and before any ballot box or voting machine is opened to count votes, the judges shall tear all unused paper ballots in half without tearing off the numbered stubs. The portion without the stubs may then be discarded, and the portion with the stubs shall be preserved.

Derivation

New Mexico Stat. Ann. § 3-12-48 (1969).

Comment

This new section is intended to preclude misuse of unvoted ballots and to preserve a record of their disposition.

730. The judges shall then lock and seal the voting machines against voting. The judges shall sign a certificate on the tally sheets that each machine has been locked against voting and sealed; the number of voters as shown on the public counters; the numbers on the seals; and the numbers registered on the protective counters. The

judges shall then open the counter compartment in the presence of the watchers and all other persons who are present, giving full view of all the counter numbers. One of the judges, under the scrutiny of a judge of a different political party, in the order of the officers as their titles are arranged on the machine, shall read aloud in distinct tones the designating number and letter, if any, on each counter for each candidate's name and the result as shown by the counter numbers. He shall in the same manner announce the vote on each question. The counters shall not in the case of presidential electors be read consecutively along the party row or column, but shall always be read along the office columns or rows, completing the canvass for each office. The total shown beside the words "Electors for (giving the name) candidate for President and for (giving the name) candidate for Vice-President" shall operate as a vote for all the candidates for presidential electors for those candidates for President and Vice-President. The vote as registered shall be entered on the duplicate tally sheets in ink by the precinct registrars in the same [p. 101] order on the space which has the same designating number and letter, if any. The minority party precinct registrar shall then read aloud the figures from the tally sheet filled in by the majority party precinct registrar for verification by the minority party judge. After proclamation of the vote on the voting machines, ample opportunity shall be given to any person present to compare the results so announced with the counter dials of the machine. The judges shall make corrections.

Derivation

T.C.A. 2-1523 and 1525

Cross-References

Sealing the voting machine keys, see § 734.

Comment

This is the present law except for some changes in the officials, and the procedure of having the minority party registrar read off the figures to be verified by the minority party judge. This change should avoid clerical errors and minority party fears of misconduct.

731. After the requirements of section 730 have been met or, where voting machines are not used, after the polling place closes, the judges shall open the ballot box in the polling place in the presence of the watchers and all other persons who are present. The judges shall alternate in drawing ballots from the box and reading aloud within sight of the other judges the names of the persons who have been voted for on each ballot, and the two precinct registrars shall record the votes at the same time for counting on record sheets. The completed record sheets shall be bound in the poll books. Two (2) judges of different political parties shall then compute the votes for each candidate and each position on a question and shall enter the totals for the paper ballots on the duplicate tally sheets in ink. The third judge shall verify the computation and entry of the totals. The paper ballot vote totals shall then be announced.

Derivation

T.C.A. 2-1317, 1318, and 1523.

Comment

This procedure parallels the voting machine procedure and is more detailed than the present law. The record sheets are new. It is made clear that the ballot box

is to be opened and the votes are to be counted in the polling place.

[p. 102] 732. The duplicate tally shall then be completed, showing the total number of votes cast for each office and question, the total number of votes cast for each candidate, including write-in candidates, and for each position on a question. The duplicate tally sheets shall be certified correct and signed by each judge and by the Officer of Elections and shall be placed in the poll books. A final proclamation shall then be made as to the total vote received by each candidate and for each position on questions.

Derivation

T.C.A. 2-1523 and 1525.

Comment

This is drawn substantially from the present law except that where the present law refers to "statement of canvass" this draft uses "tally sheet" and this draft requires duplicates instead of triplicates.

733. (a) Only ballots provided in accordance with this Title may be counted. The judges shall write "Void" on others and sign them.

(b) If the voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled or on a question, his ballot shall not be counted for such office and shall be marked "Uncounted" beside the office and be signed by the judges. It shall be counted so far as it is properly marked or so far as it is possible to determine the voter's choice.

(c) If the voter marks his ballot for an office for a dead person, his ballot for that office shall not be counted and shall be marked "Uncounted" beside the office and signed by the judges.

(d) If two (2) ballots are rolled up together or are folded together, they shall not be counted. The judges shall write on them "void" and, the reason and sign them.

(e) Any ballot marked by the voter for identification shall not be counted. The judges shall write on it "Void" and the reason and sign it.

(f) Ballots which are not counted shall be kept together and shall be bundled separately from the ballots which are counted.

[p. 103] Derivation

T.C.A. 2-1227, 1228 and 1319.

Comment

This is essentially the present law on the counting of paper ballots. Such problems do not arise with the voting machines. The preservation of void bal'ots is to assure the preservation of all marked ballots.

Subsection (c) is new and gives effect to the decision to remove dead candidates from the ballot under section 509 but it goes further and precludes write-ins for dead persons. There is no parallel section for voting machines, because the only machine counters recorded are those on the machine ballot.

734. After the tally sheets have been certified, the judges shall close and lock the voting machines and enclose the keys for each voting machine in a separate sealed envelope on which they shall certify the number of the machine, the polling place where it has been used, the

number on the seal, and the numbers registered on the public and protective counters.

Derivation.

T.C.A. 2-1527

Comment

The only change here from present law is that the machines are closed and locked and the keys sealed up after completion of the tally sheets instead of before as now required. Locking against voting is covered by section 730.

735. The Officer of Elections shall prepare and certify to the County Election Commission a list of all election officials who served at the polling place and their official position. The list shall be signed by each official.

The Officer of Elections shall certify to the County Election Commission the names of those persons appointed as officials for the polling place before the election who failed to appear and discharge the duties of office.

Derivation.

T.C.A. 2-1107 and 1117.

Cross-References

Officials who cannot serve, §§ 1217 and 410.

Comment

The present law is continued with the addition of the requirement that the election officials sign the list for their polling place.

The second paragraph in conjunction with sections 1217 and 410 makes it clear that the officials who are to be reported are those who in fact were obligated to serve on election day. A person who notifies the Commission

before election day that he cannot serve does not have to. The Commission is to appoint a replacement.

736. When the certification of the tally sheets is complete, the Officer of Elections shall publicly announce the results and [p. 104] shall, on demand of any candidate or watcher present, furnish him a certified copy of the results. The certificate shall include the names of all candidates appearing on the ballot, the number of votes received by each and the number of votes for and against each question, including separately the total number of votes cast for each by voting machine and by paper ballot. The certificate shall be signed by the Officer of Elections and the judges and may be used as competent evidence in case of a contest regardless of what tribunal is hearing the contest.

Derivation

T.C.A. 2-813 and 1531.

Comment

This continues the present law generally but restricts the duty of giving certificates of results to providing them for candidates and poll watchers.

737. After certification of the completed tally sheets and the performance of the other duties of this Chapter, the Officer of Elections shall have the following items placed in the ballot box or boxes which shall then be locked:

(a) the bound bundles of paper ballots;

(b) the record of voter assistance;

(c) the envelopes containing spoiled ballots;

(d) the envelopes containing rejected ballots;

(e) the poll books;

(f) the bound applications for ballots;

(g) the portions of unused paper ballots containing the numbered stubs;

(h) the envelopes containing the voting machine keys;

(i) the duplicate permanent registration records; and

(j) the ballot box keys.

Derivation

T.C.A. 2-1426; New Mexico Stat. Ann. §§ 3-12-54 and 3-12-55 (1969).

Comment

This is substantially new, though it probably reflects common practice.

738. The Officer of Elections, accompanied by either a judge or precinct registrar of another political party, shall immediately deliver the locked ballot box or boxes and remaining election [p. 105] supplies or equipment except the voting machines to the County Election Commission.

Derivation

T.C.A. 2-407, 1401, 1402 and 1525.

Comment

Present law sets the deadline for delivering the returns at noon on the Monday after the election. There is no need now for such a late deadline, and the practice is to turn them in immediately after the election. The requirement that the officer be accompanied by a judge or registrar of a different party is to forestall suspicion of misconduct by the Officer of Elections.

739. No election supplies, ballots or equipment may be removed from a polling place from the opening of the

polls until the requirements of section 737 have been met except that items which have been delivered to the wrong polling place may be transferred to the correct one.

Derivation

T.C.A. 2-1320

Comment

This continues the present prohibition on removal of ballot boxes and extends it to all election equipment and supplies. It also authorizes a common sense exception for mis-delivered things such as voting machines or registration books.

STATE OF TENNESSEE

SPECIAL REPORT
of
LAW REVISION COMMISSION
to
EIGHTY-SEVENTH GENERAL ASSEMBLY
concerning
A BILL TO ADOPT AN
ELECTIONS ACT
containing a
UNIFIED AND COHERENT TREATMENT
OF ALL ELECTIONS

Richard H. Allen
Leo J. Buchignani
Oris D. Hyder
Sam D. Kennedy
H. H. McCampbell, Jr.
Allen Shoffner
Carlos C. Smith
Charlie H. Walker
Charles A. Trost, Chairman

Grayfred B. Gray
Executive Director

January, 1972

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SENATE JOINT RESOLUTION NO. 92

By Baker (Sullivan)

A RESOLUTION to propose that the Law Revision Commission make a study of the election laws of Tennessee.

WHEREAS, The election laws of Tennessee have not been completely revised in a great many years; and

WHEREAS, Many amendments to the original laws have been made and many sections of the laws repealed; and

WHEREAS, Many circumstances have developed causing different and complex problems requiring election officers throughout the state to request legal opinions from State Officials; and

WHEREAS, It is the consensus of this Assembly that such a revision to re-state, supplement, consolidate, clarify, repeal and revise the general election laws would result in a more clear, concise, understandable and usable set of laws to govern the administration of elections; now

THEREFORE, BE IT FURTHER RESOLVED BY THE SENATE OF THE EIGHTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, THE HOUSE OF REPRESENTATIVES CONCURRING, That this Resolution be presented to the Law Revision Commission for

their study and that they submit their report to the next General Assembly.

ADOPTED: February 20, 1970

Frank C. Gorrell,
SPEAKER OF THE SENATE

William L. Jenkins,
SPEAKER OF THE HOUSE OF REPRESENTATIVES

APPROVED: February 27, 1970

Buford Ellington,
GOVERNOR

[p. 1] SUMMARY OF WORK DONE IN PREPARATION
for the
RECOMMENDATIONS OF THE COMMISSION

The Commission began its study of the election laws in 1970 by soliciting comments and suggestions from approximately 1500 Tennesseans and organizations having an interest in the election processes. It further reviewed the reports of official bodies which had previously studied Tennessee's election laws.

Due to the complexity of the existing law and its internal conflicts and inconsistencies, the Commission had its draftsman, Grayfred B. Gray, Esq., prepare a work document as a restatement of the existing law using simplified language and functional organization. The Work Document of April 1971 was widely distributed for comment and criticism. Copies went to all members of the 87th General Assembly and every County Election Commission.

Early in 1971 the Commission invited the political parties and other organizations to name representatives to work with the Commission in its study of election problems and in the development of its recommendations to the General Assembly. All three political parties and seven other organizations appointed such representatives. After the appointment each representative received copies of all materials considered by the Commission. Meetings of the [p. 2] Commission were open to participation by the representatives except for two meetings held for the purpose of instructing the Commission's draftsman. The latter meetings were open to the representatives as observers.

The following is a summary of the various steps taken in developing the recommendations:

1. Memoranda were prepared on a number of legal and practical problems in the election process.

2. Statutes from other states were examined and used where compatible with the basic system in Tennessee.

3. A policy memorandum was prepared listing major policy decision with the implications of various alternative decisions.

4. On the basis of these studies and the numerous suggestions which had been sent to the Commission, the Commission made tentative policy decisions and had drafts prepared.

5. Numerous drafts of various parts of the election laws were prepared, distributed to interested parties, and considered by the Commission.

6. The Commission's draftsman and the State Coordinator of Elections, Honorable Shirley Hassler, went to South Carolina to examine its system of computer registration and reported their findings to the Commission.

7. The Commission's draftsman attended the meetings during 1970 and 1971 of the Tennessee Association of County [p. 3] Election Commissioners to discuss election problems and various proposed solutions in the light of the Election Commissioner's first-hand experience.

8. In September of 1971 the Commission held one day public hearings on the election laws in Knoxville, Nashville and Memphis,

9. In October of 1971 a Tentative Draft of Title 2 was distributed for comment and consideration. It did not include criminal penalties.

10. A survey was made of sections of the Code outside Title 2 which would be affected by the Tentative Draft and amendments were prepared.

11. Drafts of alternative provisions were prepared where there appeared to be disagreement among interested parties and on highly political issues.

12. In addition to the public hearings the Commission met to consider the election laws study seven times during 1971.

13. Section by section comments were prepared, showing the source or sources of each section, relevant Tennessee statutory and constitutional citations, and a brief explanation of purpose and of changes in the section from the present law. The comments are in this report with the Act.

The Commission believes that the proposed Act is based upon thorough research, has been carefully drafted, and has [p. 4] been reviewed by a representative number of those persons most interested in its provisions.

[p. 5] SUMMARY OF CONCLUSIONS AS TO INADEQUACIES OF EXISTING ELECTION LAWS AND THE NEED FOR ENACTMENT OF A REVISED ELECTIONS ACT

To appreciate fully the need for election law revision it is necessary to be aware of the development and nature of the current laws.

Codified in 1858 and amended at many successive sessions of the General Assembly, the laws have been an attempt to serve the needs of the electorate, the candidates, and the political parties.

Under the early statutes, all polling places used paper ballots. Having many polling places was essential so that people would be within walking distance of the polls. Communications were limited, and candidates travelled around their districts on horseback or by buggy talking with people on the farms and in the general store.

Though the statutes were amended and changed only infrequently up to the latter part of the 19th century, from the mid-20th century on the statutes have been amended and changed in almost every session of the General Assembly in an effort to met modern-day demands. From a 36-page booklet in 1890 the election code has grown to a 242 page Election Laws Manual, plus 72 pages in the 1970 supplement to the Code.

[p. 6] Necessity has brought about many of the changes. The desire to use voting machines added a new chapter to the election law in 1937. By 1959 the cumbersome code, plus the ever-increasing complexity of the election system and the recommendation of the Legislative Council Committee, caused the legislature to create the position of Coordinator of Elections. Since 1959, innumerable amendments have been enacted to remove conflicts in the statutes, to clarify them, and to attempt to update them.

Twenty-four years ago in 1947 an Election Commission was created by the General Assembly to study the election laws. The Commission reported that:

> The fact that election law bills are submitted at practically every session of the legislature indicates an unsatisfactory situation. Every one of these proposed laws is intended to correct an existing evil. In the past 100 years Tennessee Election laws have been changed in this piecemeal fashion. As a result we have a multiplicity of election laws with many conflicts and much uncertainty . . . [1]

The Commission concluded that:

> . . . the elimination of these irregularities will not be found in making the election laws more complex by the adding of additional details, but rather in a simplification of the laws, to be obtained by complete revision.[2]

In 1957 the General Assembly again became concerned with the complexity of election laws and asked the [p. 7] Legislative Council to conduct a study. The Council's conclusions bore marked similarities to those of the 1948 Commission:

> A great many existing errors and conflicts, though in need of correction, could await a comprehensive revision of the election laws, should . . . arrangements . . . be made for such revision by the legislature.[3]

By 1965 dissatisfaction with the condition of election laws was again expressed by the legislature when it empowered the Legislative Council to restudy the laws to provide still greater progress in modernizing them.

The Legislative Council Committee recognized the continuation of past problems and specifically noted the lack of a "central authority in Tennessee which can promulgate rules and regulations, or issue instructions to be followed by local election boards, or to compel the boards

to obey the law. No central election authority is given power to investigate irregularities in the administration of the election laws or to investigate charges of frauds."[4]

Though the position of Coordinator of Elections was created and filled in 1959, the statutes provided an advisory rather than a supervisory position. Therefore, there continued to be "the lack of uniformity caused by differing interpretations of the law."[5]

The Law Revision Commission viewed the 1970 mandate in Senate Joint Resolution No. 92 to "make a study of the election laws of Tennessee" in the light of the three pre-[p. 8]vious studies conducted at the request of the legislature. The joint resolution specifically points out that the election laws have not been completely revised in a great many years and charges the Commission to "restate, supplement, consolidate, clarify, repeal and review" the laws so as to "result in a more clear, concise, understandable and usable set of laws."

One of the more glaring deficiencies in the election laws now is that it is difficult to find what one needs in it. Materials governing the conduct of elections at the polling places, for instance, are found in no less than seven chapters of the twenty-two chapters which make up Title 2.

There are also numerous practical inadequacies. For example, the political parties' Primary Boards are to be appointed on the first Monday in May of even number years from lists furnished by candidates who have qualified for the August elections. The deadline for filing for the August elections is the first Thursday in June.

The cost of elections if they were carried out as the law now contemplates would be prohibitive. For the biennial August elections each party having a primary is to have its own set of officers and there is to be a set of officers for the general election at the same time.

Terms are used with varying meanings which make it difficult for lawyer and layman alike to understand what the law actually requires of them. For example, the word [p. 9] "officer" is used to refer to the officer of elections, the officer to whom election returns are to be delivered and in places to refer to judges. The term "inspector" is used apparently to mean poll watcher, but he is given the authority of a peace officer which it appears clear no poll watcher is meant to have.

The Coordinator of Elections, an office which is "to coordinate election activities throughout the state," to interpret questions of law for county election officials, to "arrange for the training of new election officials with a view toward uniformity of election procedures throughout the state," to keep the election laws manual up to date, to prepare condensed handbooks for election officials, and to suggest amendments to the election laws, is still only a part time position, although elections are being held in Tennessee practically year round.[6]

The deficiency which results from these and other problems is that much of the law appears to be commonly disregarded in the interests of having simple, fair and economical elections.

Finally, and perhaps most important, the citizens who have the responsibility for carrying out the law and the citizens for whose protection the law is written find it

very difficult to use the law as it is now written. In this area where laymen are commonly called on to know and understand the law, the law must be as nearly as possible in plain English.

[p. 10] SUMMARY OF FEATURES OF THE PROPOSED BILL TO ADOPT A REVISED ELECTION ACT FOR TENNESSEE

The section-by-section comments which will be filed with the proposed election Act state the sources of each section, refer to the existing, statutory law in Tennessee on the subject, supply cross-references in the new Act where appropriate, and briefly explain the purpose of each section except for those which merely continue the present law.

The Law Revision Commission has made no attempt to depart from the general principles established in the current election code. It has, rather, attempted to simplify procedures and language in the light of current practices, while maintaining appropriate safeguards and providing a fair election system at a reasonable cost to the taxpayer.

The Act provides uniform rules for all elections conducted in the state. General procedures will be the same for primary and general elections, local elections and questions submitted to the people, and the procedures for all are in the same place.

Recognizing that political parties should ultimately control purely party questions, the proposed Act provides for that control purely party questions, the proposed Act provides for that control but still reduces the

number election officials and places the basic responsibility for holding [p. 11] primaries in the County Election Commission. The parties control who votes in their primaries, the determination of the winners, and primary election contests and may, if they wish, decide who runs in their primaries.

The proposed act provides a comprehensive set of definitions covering terms used throughout the act, thereby giving greater coherence to the act and making it easier to use.

The responsibilities of the Coordinator of Elections are enlarged to provide uniformity in both the conduct of elections and the maintenance of records, to permit the issuance of rules and regulations, and to vest the Coordinator with the authority to investigate or have investigated the administration of the election code. To insure that the Coordinator performs in a nonpartisan way, the State Election Commission is equally divided between the majority and minority parties and is given the power to appoint the Coordinator for a four year term and, in appropriate cases, to remove him.

The proposed Act contains provisions which make registration more accessible to voters but preserve the security of the registration system which is critical to honest elections. Mandatory supplemental registrations are reduced, but the Commission offices are to be open one Saturday a month and an annual precinct registration is required in counties of over 50,000 people.

[p. 12] The Commission believes that this annual precinct registration should meet the need for close to home registration which leads many people to ask for

mobile registration programs. In addition the authority of the County Election Commission in conducting registration is clarified.

Procedures and standards for purging registrations are clarified with adequate safeguards to permit purged voters to re-register if eligible.

Because of developments in federal constitutional law, it appears clear that permitting non-residents to vote in municipal elections is unconstitutional. On the other hand, if it is not unconstitutional, it opens the legal door to other classes of non-residents to vote, thereby risking turning control of municipalities in some instances over to non-residents. In either case, the Commission concluded that voting on property qualifications should not be permitted, and it is not under this Act.

Disfranchisement for infamous crimes under certain limitations is permitted by the Tennessee Constitution; however, it is virtually impossible to administer disfranchisement properly or equitably. Therefore, this Act does not disfranchise for criminal convictions, but people who are imprisoned are not permitted to vote.

Provision for uniformity, efficiency, and economy in the operation of polling places on election day is provided by [p. 13] establishing a minimum and maximum size for precincts, a ten-to-twelve hour voting period with a uniform closing time in multi-county elections, by eliminating clerks, by requiring the Officer of Elections to be responsible for the conduct of elections at his assigned polling place, and by requiring that general and primary elections on the same day be held at the same place and by the same officials for most matters. Trained, skillful

persons should be able to serve as polling place officials due to increased compensation which will probably cover the cost of serving as an official.

Numerous safeguards are included to preserve the purity of elections, such as use of serially numbered ballots, use of duplicate registration records in all elections, attendance at polling place of poll watchers from various groups, clarification of 100-foot boundary within which no campaign literature may be shown or distributed, assistance by either a family member or election officials of different political parties in voting by the blind, physically disabled or illiterate, the channeling of all challenges through election judges, and the required state-wide use of voting machines with sanctions for non-compliance.

The absentee voting provisions preserve all procedures necessary to safeguard the ballot while eliminating unnecessary procedures. Use of the absentee ballot is permitted to those who will be outside the county during the hours the polls are open on election day and to those who are sick or physically disabled or who expect to be hospitalized. During the [p. 14] absentee voting process there continue to be requirements for attesting officials, certificates of non-registration, and signature comparisons by both the registrar and the absentee ballot counting board.

The role of the County Election Commission as a ministerial body is clarified, providing resolution of disputes through the courts, with the Commission being represented by the office of the state Attorney-General.

The size of County Primary Boards is reduced to three members, because of the reduction of their duties. Since they are to be purely party officials with few duties, authorization for compensation is eliminated.

The Commission examined the election laws in the light of rapidly developing technology available for use in elections. The proposed Act would permit the experimental use of new voting machines under rigorous safeguards so that future General Assemblies could have the benefit of Tennessee experience in considering further changes in the voting machine law.

The procedure for election contests has been simplified, and most are to be tried in the chancery courts. A procedure is provided for expeditious decision of any contest of the election of presidential electors. To discourage malicious or frivolous contests, the Act provides that costs and reasonable attorneys fees are to be assessed in malicious or frivolous contests.

[p. 15] The law on election expenditures is largely unchanged except for requiring the naming of persons who contribute or receive $100 or more in a campaign. The present criminal sanction is replaced by a ban on being a candidate for six years after the election. Uniform report forms are also to be provided.

Presidential electors are bound to vote for their party's candidates with certain exceptions.

The law on contests of the election of Governor is practically unchanged except for permitting the candidate who prevails on the face of the returns to withhold

his objections unless the contestant raises objections sufficient to change the result of the election.

Provisions of the existing Code which would be repealed by this Act are specifically repealed, and many provisions outside Title 2 are amended to conform to the proposed Title 2.

While accurate figures have proven unobtainable, the Commission believes that the net effect of the proposed Act will be to reduce the cost of operation of the election system.

NOTE

Recognizing that some matters are highly political and that there is great debate on others, the Commission has had drafted alternative sections on these points.

[p. 16] These alternatives, with necessary changes in other parts of the proposed Act to implement each alternative, are printed in a Supplement. The alternatives are not recommended by the Commission but are included to show alternative language which is compatible with the proposed Act for the use of the members of the General Assembly.

[p. 17] SPECIAL RECOMMENDATION

In the course of its study the Commission examined the South Carolina system of providing a central computer registration file for the entire state. The Commission believes that such a system would be a distinct asset in Tennessee in keeping registration records accurate, in providing state support for a system which most counties

could not afford but could benefit from, and in maximizing the benefits which the State obtains from its computer systems.

The specifics of the system can best be developed in the light of the computer system available to the State, a matter which is now under study in the Department of Finance and Administration. In addition, setting up the system will apparently take some eighteen months.

The Commission recommends that the Coordinator of Elections be directed to develop, in conjunction with relevant state agencies, a plan for establishing a central computer registration system for Tennessee and to prepare any necessary amendatory legislation. The plan should be presented to the General Assembly in January of 1973 so that, if approved, it can be implemented in time for the 1974 biennial elections.

[p. 18] CONCLUSION

In the preparation of the proposed Act, the Commission has followed no doctrinaire theory. An effort has been made to consider carefully the practical effect of each provision. While the substance of many provisions of existing Tennessee law has been retained, where improvements in either substance or language appeared desirable, we have attempted to make them.

This project would not have been possible without the assistance of Tennesseans from every part of the State and from all walks of life. We are particularly grateful to the people appointed to represent various organizations in the study. They were:

Representative Charlie Ashford, House Republicans

Al Barger, Esquire, Tennessee Association of County Election Commissioners

Julian Blackshear, Esquire, Tennessee Voters Council

Professor James Blumstein, American Civil Liberties Union of Tennessee

George R. Carr, Tennessee Association of County Election Commissioners

Lee Case, Tennessee State Labor Council

Representative Riley C. Darnell, House Democrats

Senator Bill Davis, Senate American Party

Andrew Dix, National Association for the Advancement of Colored People

Mrs. Richard J. Eskind, Federation of Democratic Women

[p. 19] Mrs. Walter Gobbel, Federation of Republican Women

S. Ralph Gordon, State Republican Executive Committee

Senator Douglas Henry, Jr., Senate Democrats

T. A. Hickman, Chairman, State American Party Executive Committee

Mrs. Lawrence Levine, Tennessee League of Women Voters

Todd Meacham, Esquire, State Republican Executive Committee

Bryan U. Melton, State American Party Executive Committee

Seth Norman, Esquire, State Democratic Executive Committee

Senator Daniel W. Oehmig, Senate Republicans

Mrs. James Tuck, Tennessee League of Women Voters

Horace V. Wells, Jr., Tennessee Press Association, Inc.

Many other Tennesseans have been helpful in this study. We wish to give a special word of thanks to Honorable Shirley Hassler, Coordinator of Elections, and Honorable Robert H. Roberts, Assistant Attorney General, for the assistance and suggestions they have given in the development of the proposed Act.

We believe that the proposed Act will be an aid to voters, to people who have to administer the election laws, and to political parties and candidates. There will be those who will be disappointed that the proposed Act is not a major piece of reform legislation. The Commission saw its job in this study, however, as simply improving the

(This following page, page 20, is a duplicate of previous page 19).

[p. 20] Mrs. Walter Gobbel, Federation of Republican Women

S. Ralph Gordon, State Republican Executive Committee

Senator Douglas Henry, Jr., Senate Democrats

T. A. Hickman, Chairman, State American Party Executive Committee

Mrs. Lawrence Levine, Tennessee League of Women Voters

Todd Meacham, Esquire, State Republican Executive Committee

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In 1970 the General Assembly directed this Commission to undertake this project. We have devoted to it our

best efforts. We trust that our recommendations will be of assistance to you and we hope that they will meet with your approval.

Richard H. Allen

Leo J. Buchignani

Oris D. Hyder

Sam D. Kennedy

H. H. McCampbell

Allen Shoffner

Carlos C. Smith

Charlie H. Walker

Charles A. Trost, Chairman

[p. 22] FOOTNOTES

1. Report of the Election Law Commission to the Seventy-sixth General Assembly of Tennessee, p. 8.
2. Ibid, p. 9.
3. Tennessee Legislative Council Committee, *1957-58 Final Report to the 80th General Assembly,* Nashville, 1958, p. 39.

4. Tennessee Legislative Council Committee, *Final Report, Study on Election Laws,* Nashville, 1966, p. 21.
5. Ibid., p. 27.
6. T.C.A. 2-110 and 2-111.

QUESTION PRESENTED

Does the First Amendment prohibit a State from criminalizing the election-day display and distribution of campaign materials and the solicitation of votes regarding the election being held that day, within 100 feet of the entrance to polling places, on property generally accessible to the public at large, while permitting all non-political messages, as well as political messages not directly pertaining to that election, to be communicated at the same locations?

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No. 90-1056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CHARLES W. BURSON, Attorney General and Reporter
for the STATE OF TENNESSEE,

Petitioner,

vs.

MARY REBECCA FREEMAN,

Respondent.

BRIEF OF RESPONDENT

RELEVANT STATUTES

In addition to the statutes set forth in petitioner's brief ("Pet. Br. ___"), other relevant Tennessee statutes are contained in a statutory addendum to this brief ("Add. ___a"). All references to the Tennessee Code are to the 1972 edition unless otherwise indicated.

STATEMENT OF THE CASE

This case is before the Court on writ of certiorari to the Supreme Court of Tennessee to review that court's ruling that Tennessee Code Annotated §2-7-111 (Pet. Br. 2-3), which prohibits the distribution of campaign literature, the display of campaign materials, and the solicitation of votes in or near to polling places,

and Tenn. Code Ann. § 2-19-119 (Add. 5a), which fixes criminal penalties for the violation of § 2-7-111, are facially invalid under the First Amendment to the United States Constitution. *Freeman v. Burson*, 802 S.W.2d 210, 214 (Tenn. 1990) (Petition for Writ of Certiorari 7a-20a) ("Pet. App. ___a"). In order to understand why that ruling is correct, it is first necessary to consider the operation of polling places in Tennessee as they are affected by § 2-7-111.

Polling places in Tennessee are located, when practicable, in public schools and other public buildings, such as firehalls and public community centers, but they may also be located in private buildings, *e.g.*, churches, private schools and private community centers. See Tenn. Code Ann. § 2-3-107 (Add. 1a). These buildings are used by the State only on election days and otherwise revert to their normal activities; indeed, these facilities may also be used on election days for their regular purposes while simultaneously being used as polling places.

Tennessee Code § 2-7-111 burdens the rights of free expression in three different respects. The first involves a prohibition of speech and conduct inside the building in which the polling place is located, where "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on any question are prohibited." § 2-7-111(b). Respondent did not challenge this restriction, and the Supreme Court of Tennessee did not address restrictions inside the polling place, other than to note (802 S.W.2d at 213; Pet. App. 15a), that the State has shown a compelling interest (albeit one not advanced by § 2-7-111) in banning solicitations of voters or distribution of campaign materials within the polling place itself -- a point which respondent readily concedes.

The second kind of restriction, which was the focus of most of the proof at trial, prohibits these election-related activities within a 100-foot radius of every entrance to a polling place. Proof at trial showed that in many instances the statutorily-prescribed 100 feet from the entrance to the polling place includes public streets and sidewalks, as well as parking lots for the polling place itself. (802 S.W.2d at 213; Pet. App. 15a; see also, Joint Appendix ("JA") 23-24, 42). Respondent testified that this boundary has, at some polling places, prevented her from soliciting voters. (JA 23-

24). In addition to interfering with efforts to solicit votes directly, the law also forbids, within the 100-foot radius, the placing on the ground or the carrying of signs or posters regarding the pending election, and even extends to the wearing of caps or shirts with a candidate's name on it. (*Id.* at 42).[1]

The third kind of restriction prohibits only the display of campaign posters, signs, or other campaign materials on or in any building or on the grounds of any building in which a polling place is located. Thus, a person could lawfully verbally solicit votes "on the grounds" of the polling place more than 100 feet from the entrance, but the carrying of signs and, in all probability, the distribution of handbills or circulars at such a location, or the parking of a vehicle with a partisan bumper sticker on polling place grounds outside the 100-foot boundary, may also constitute a prohibited "display" of campaign literature.[2]

Proof at trial showed that in-person solicitation of voters at polling places is especially important for races for lesser-known offices, which are typically located near the bottom of the ballot, and in district-specific political races where other means of communication, such as paid advertising, would not be cost-effective. (JA 21-23).

This action was filed in the Chancery Court for the State of Tennessee at Nashville on July 27, 1987. Respondent sought declaratory and injunctive relief as to the challenged statutes on the ground that they violate the First and Fourteenth Amendments to the United States Constitution and corresponding

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[1] In twelve of Tennessee's ninety-five counties, the boundary extends to three hundred feet. Tenn. Code Ann. § 2-7-111(a). The predecessor of the petitioner Attorney General (an original defendant in the trial court), however, has opined that this distinction is unconstitutional according to Article XI, § 8 of the Constitution of the State of Tennessee. (Addendum to Brief in Opposition to Petition for Writ of Certiorari, 1a-5a.) While this issue was raised in the pleadings, the Supreme Court of Tennessee did not reach it.

[2] Proof at trial suggested that carrying signs and handing out literature "on the grounds" beyond the 100-foot boundary would be permitted but putting signs into the ground or on the building is not. (JA 35-36). *But see United States v. Grace*, 461 U.S. 171, 176 (1983) (distribution of leaflets deemed to be the "display [of a] flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" within the meaning of 40 U.S.C. § 13k.

provisions of the Tennessee Constitution. At a bench trial conducted on October 24, 1988, respondent, a long-time political party activist, testified about how the 100-foot boundary had limited her ability to solicit votes at or near polling places. (JA 20-24). Her proof showed that the 100-foot boundary sometimes extends across the street from the entrance to a polling place. (*Id.* at 24). She testified that she had received political communications at the polling place, and that in some cases her vote had been swayed by information she had received at the polls. (*Id.* at 28-29).

Respondent has never asserted a right nor averred any intention to solicit votes inside the polling place. Rather, her case challenged only the restrictions on soliciting votes outside. (JA 18-24). Petitioner's conjecture (*id.* at 40, 48-49) about what might happen if solicitation were permitted inside a polling place is irrelevant since respondent claims no right even to enter a polling place for any purpose other than to vote; indeed, another Tennessee statute would prohibit any such unauthorized entry. See Tenn. Code Ann. § 2-7-103. (Add. 1a-2a).

The only witness presented by the State was Constance Ann Alexander, who was then employed as Registrar at Large for Davidson County and who had extensive experience with the conduct of elections. (JA 33-34). She offered as the sole justification for the challenged statute her prediction as to what would happen *inside* the polling place absent the 100-foot buffer zone *outside* of it. She testified that in her opinion, if the 100-foot boundary were abolished, there would be "total havoc," in that there would be room for error in totaling the votes and the polling place would be overcrowded. (JA 39-40). At no time did she suggest that any harm would occur outside the premises, that anyone would be obstructed from entering the building, or that any other adverse effects would occur without the statute.

In a Memorandum Opinion filed April 26, 1989 (Pet. App. 1a-6a), the Chancellor upheld the challenged statutes as a content-neutral time, place, and manner restriction, and a Final Order dismissing the Complaint was entered on May 5, 1989. (JA at 50-51). Respondent appealed as of right to the Supreme Court of Tennessee, which, in a 4-1 decision announced October 1, 1990 (802 S.W.2d 210; Pet. App. 7a), reversed the decision of the Chancellor and declared the challenged statutes unconstitutional under the First Amendment. (802 S.W.2d at 214; Pet. App. 18a).

The Supreme Court of Tennessee, applying the "strict scrutiny" standard of review, found: (1) that § 2-7-111 is impermissibly "content-based because it regulates a specific subject matter, the solicitation of votes and the display or distribution of campaign materials, and a certain category of speakers, campaign workers" (802 S.W.2d at 213; Pet. App. 14a); (2) that, while the State has an interest in maintaining peace, order, and decorum at the polls and preserving the integrity of the electoral process, the State had failed to show that the burden placed on free speech rights is justified by a compelling state interest in the 100-foot radius (802 S.W.2d at 213; Pet. App. 14a-15a); (3) that the State had failed to show that the statute is narrowly tailored to advance the State's interest (802 S.W.2d at 213; Pet. App. 15a); and (4) that the statute is not the least restrictive means to serve the State's interests (802 S.W.2d at 214; Pet. App. 17a). Accordingly, it did not reach the claims based on the Tennessee Constitution.

SUMMARY OF ARGUMENT

The Supreme Court of Tennessee correctly applied long-standing principles of First Amendment jurisprudence, reflected in numerous decisions of this Court, in applying the strict scrutiny standard of review to the challenged statutes. The challenged statutes criminalize core political expression -- and nothing else -- even though "First Amendment protection is 'at its zenith'" when applied to political speech. *Freeman v. Burson*, 802 S.W.2d at 212; Pet. App. 13a, quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

The state court correctly ruled that Tenn. Code Ann. § 2-7-111 is content-based and that application of the time, place, and manner analysis is inappropriate. *Cf. Boos v. Barry*, 485 U.S. 312, 318-21 (1988). The distinction urged by petitioner between "content-based" regulations of speech and so-called "subject matter-based" regulations (Pet. Br. 16) is completely untenable. This Court has repeatedly held that "a constitutionally permissible time, place or manner restriction may not be based upon either the content or subject matter of speech[,]" but rather "must be applicable to all speech irrespective of content." *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 536 (1980).

The challenged statutes not only unconstitutionally limit the right of the speakers to disseminate election information, but deny the voting public the opportunity to receive political communications. The First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

Even if time, place, and manner analysis were applicable, the challenged statutes are still unconstitutional because, as the Tennessee Supreme Court found, they are not narrowly tailored to serve the governmental interests asserted by the State, which are solely to protect the sanctity of the ballot place itself. These statutes prohibit far more speech than is necessary to achieve the asserted governmental interests, since all displays or distributions of printed materials and solicitations of votes are forbidden, without regard to whether such communications are disruptive or peaceable. Moreover, as the Tennessee court concluded, existing Tennessee statutes governing conduct at or near to polling places are adequate to prevent voter harassment or intimidation, interference with election officials' duties, or the presence of unauthorized persons inside polling places, without burdening the pure speech banned by § 2-7-111.

The alternative channel suggested by the State, communication with voters outside the 100-foot boundary, is inadequate and ineffective, as the trial testimony revealed. More importantly, "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981).

ARGUMENT

The matter at bar touches constitutional interests of the first magnitude. "A State's broad power to regulate the time, place and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.'" *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989), quoting *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). The criminal statutes challenged here "directly affect[] speech which

'is at the core of our electoral process and of the First Amendment freedoms.'" *Eu*, 489 U.S. at 222-23, quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

This Court has recognized repeatedly that debate on the qualifications of candidates is integral to the operation of the system of government established by our Constitution. Indeed, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. The election campaign is a means of disseminating ideas as well as attaining political office. *Eu*, 489 U.S. at 223; *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Illinois Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979).

The Court in *Tashjian*, *supra*, described its analytical task as to state election statutes challenged on First Amendment grounds:

> We begin from the recognition that constitutional challenges to specific provisions of a State's election laws cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions.... Instead, a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

479 U.S. at 213-14 (citations omitted).

I. BECAUSE § 2-7-111 IMPOSES CONTENT-BASED RESTRICTIONS ON POLITICAL SPEECH, IT MUST, BUT CANNOT, PASS STRICT SCRUTINY.

"Legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guaran-

tees of the First Amendment." *Meyer v. Grant*, *supra*, 486 U.S. at 428, quoting *Buckley v. Valeo*, 424 U.S. 1, 50 (1976). Even a cursory reading of Tenn. Code Ann. § 2-7-111 reveals that this statute does violence to established First Amendment principles because it restricts one and only one category of speech -- that directly relating to elections for public office and to other measures that appear on the election day ballot.

A content-based restriction on political speech in a public forum must be subjected to the most exacting scrutiny. *Boos v. Barry*, *supra*, 485 U.S. at 321. As the Supreme Court of Tennessee correctly recognized (802 S.W.2d at 213; Pet. App. 14a), § 2-7-111 by its own terms criminalizes the communication of "a specific subject matter, the solicitation of votes and the display or distribution of campaign materials, and [punishes] a certain category of speakers, campaign workers."

This Court has time and again ruled that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983); *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*, *supra*, 447 U.S. at 537; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 64 (1976) (per Justice Stevens joined by three other Justices); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976); *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 520 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975).

As the Court observed in *First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. at 784-85, "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." That constitutionally forbidden course of action, however, is precisely what the Tennessee General Assembly has chosen by enacting § 2-7-111, which imposes a direct prohibition on dissemination of a particular type of-message and no other. For example, a person may lawfully wear a jacket graphically expressing his sentiments about the draft as he enters a Tennessee polling place, *cf. Cohen v. California*, 403 U.S. 15 (1971); however, if that same person affixes to that jacket a

lapel badge bearing the likeness of a political candidate on that day's ballot, he risks going to jail.

This Court has repeatedly held that "the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*, *supra*, 447 U.S. at 537. *See also Boos v. Barry*, *supra*, 485 U.S. at 319 (per Justice O'Connor, with two Justices concurring and five Justices concurring in part); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364, 384 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 519 (1981) (plurality opinion); *Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980).

This Court has recognized very few exceptions to these principles, and those that it has have primarily involved speech which falls completely outside the protection of the First Amendment, *i.e.*, "utterances [which] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words); *Roth v. United States*, 354 U.S. 476, 485 (1957) (obscenity); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (false statements of fact); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography).

Within the realm of First Amendment-protected speech, this Court has sometimes sustained regulations which treat certain categories of "lesser" protected speech differently from speech which is afforded "greater" protection, based upon the subject matter of the expression. These decisions have primarily involved commercial speech,[3] *see e.g.*, *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, *supra*, 447 U.S. at 563, and speech related to a variety of sexual topics. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70-71 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2

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[3] Even in the area of "commercial speech," prohibitions "directed at speech itself, and . . . intimately related to the process of governing" are subject to strict scrutiny analysis. *First National Bank v. Bellotti*, *supra*, 435 U.S. at 786.

(1986) (zoning of pornographic movie theaters); *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978) (radio broadcast of "indecent," but non-obscene, language); *Barnes v. Glen Theatre, Inc.*, 59 U.S.L.W. 4745 (1991) (nude dancing). However, this Court has never countenanced *more* stringent regulation of core political speech than other subjects of expression, and it should now reject the proposal to break new ground under the First Amendment urged by petitioner.

Petitioner's brief, at 12-14, relies upon *dictum* in the plurality opinion in *Boos v. Barry*, *supra*,[4] to suggest that the challenged statutes are properly analyzed as "content-neutral" regulations of the time, place, and manner of speech according to the so-called "secondary effects" doctrine of *City of Renton v. Playtime Theatres*, *supra*. A careful reading of the plurality and concurring opinions in *Boos*, however, establishes that petitioner's reliance is misplaced. The statutes invalidated by the Supreme Court of Tennessee, like the portion of the District of Columbia regulation invalidated by this Court in *Boos*, burden only persons who communicate explicitly political messages (in a quintessential public forum), while speakers of other messages are left unaffected.

While a regulation of speech that serves purposes unrelated to the content of expression may be deemed content-neutral, even if it has an incidental effect on some speakers or messages but not others, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), that is not this case. Here, as in *Boos* (and unlike in *Renton*), "the government has determined that an entire category of speech . . . is not to be permitted." 485 U.S. at 319 *But see Renton*, 475 U.S. at 54 ("Renton has not used 'the power to zone as a pretext for suppressing expression'"). There is absolutely no basis in this record to conclude that the prohibited political speech has any kind of effect, whether "primary" or "secondary," in any manner different from that of the permitted non-political speech; indeed, the proof is quite to the contrary. The government's expert witness testified that charitable solicitation or religious solicita-

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4 ". . . Respondents and the United States do not point to the 'secondary effects' of picket signs in front of embassies. They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies. . . ." 485 U.S. at 321.

tion inside the 100-foot boundary would pose the same kind of problems as solicitation of votes, (JA 41, 49), yet they are permitted. Petitioner is thus hoisted by the testimony of his own expert.

Moreover, careful examination of § 2-7-111 in light of the testimony of the State's witness suggests that the impetus for passage of this legislation in fact was concern over the primary effect of political speech at polling places, to wit: the potential impact upon that day's election. This is indicated most clearly by the fact that discussion of political candidates not on the ballot is unaffected by § 2-7-111. Thus, the State's witness testified that a person is permitted to distribute handbills, within the 100-foot boundary, on behalf of a political figure who is not standing for election on that day's ballot. (JA 44). The import of this testimony is that solicitation on behalf of some politicians is permitted at the very same locations where solicitation on behalf of other politicians is prohibited. This anomaly clearly demonstrates that it is the message of how voters should act on election day, and nothing else, that is the aim of § 2-7-111.

This anomaly is not merely a hypothetical possibility. For example, Tennessee's presidential preference primary is held in March every four years,[5] whereas primary elections for the offices of governor, public service commissioner, members of the General Assembly, United States senator and members of the United States House of Representatives are held during August.[6] According to the uncontroverted testimony of petitioner's witness as to the correct interpretation of § 2-7-111, a person could lawfully stand inside the 100-foot boundary on the day of the August 1992 primary election and advocate the re-election or defeat of President Bush, but that same person could not at the same location advocate the re-election or defeat of the local member of the Tennessee General Assembly or of the United States House of Representatives without risking criminal prosecution.

There is absolutely no reason to believe that the solicitation of a vote for or against the President in August 1992 will have a "secondary" effect in any manner different from the "secondary"

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5 Tenn. Code Ann. § 2-13-205 (Add. 4a).

6 Tenn. Code Ann. § 2-13-202 (Add. 3a).

effect of a similar solicitation as to a Congressman or a State Senator. The only difference is the potential impact on the voter's choice of candidates in that day's election. A listener's reaction to speech, however, is not a secondary effect. *Boos v. Barry*, *supra*, 485 U.S. at 321.

Similarly, § 2-7-111 prohibits only "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question." Under this statute, a person may lawfully stand within the 100-foot boundary and distribute handbills advocating a boycott of the election, while a person distributing handbills advocating a vote for or against a candidate or political party would be subject to criminal prosecution. Petitioner has not even attempted to offer any justification for prohibiting the message, "Vote," at the same time and place where the opposing message, "Don't Vote," is permitted. And whatever that justification might be, it surely has nothing to do with any "secondary effects" of the different messages.

Contrary to petitioner's mistaken assertion (Pet. Br. 14), the plurality in *Boos* did not in fact apply "secondary effects" analysis; it instead found no basis to do so because the government pointed only to the primary impact of the prohibited speech. 485 U.S. at 321. As the concurring Justices noted in *Boos*, "the challenged statute would be treated as content-based under either *Renton* or the traditional approach, and the opinion could easily have stated simply that we need not reach the issue whether *Renton* applies to political speech because even under *Renton* the law constitutes a content-based restriction." *Id.* at 338.

Another distinction between this case and *Renton* is that the unwanted so-called "secondary effects" of speech at polling places are amenable to direct regulation, unlike the anticipated urban blight, diminution of property values, and deterioration of residential neighborhoods surrounding pornographic movie theaters in *Renton*. If the Tennessee General Assembly is concerned about interference with ingress and egress to polling places, it is free to prohibit that without reference to speech. That body has already enacted non-speech-related legislation limiting the persons who may enter the polling place. *See* Tenn. Code Ann. § 2-7-103. (Add. 1a). It is already unlawful, again without reference to speech, to prevent or attempt to prevent the performance of an

election official's duties or to prevent or attempt to prevent the exercise of voting rights. *See* Tenn. Code Ann. § 2-19-103. (Add. 4a).

The *Young* and *Renton* decisions and their pornography-outlet zoning progeny[7] indicate that, in order for the "secondary effects" doctrine to apply, there must be an evidentiary showing sufficient to conclude that the legislative body of a government which seeks to restrictively zone outlets for sexual materials could have concluded that the impact of these businesses on the surrounding area is different from that of businesses not dealing primarily in sexual materials.[8] The Court of Appeals' opinion in *Renton* indicates that the Renton City Council made detailed legislative findings to this effect, *see Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 530-31 n.3 (9th Cir. 1984), as did the Detroit Common Council in *Young*, *supra*, 427 U.S. at 54-56 n.6 (plurality opinion), and 81 n.4 (Powell, J., concurring).

Renton by its own terms recognized that "society's interest in protecting this type of expression [pornographic movies] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." 475 U.S. at 49 n.2; *see also Young v. American Mini Theaters*, *supra*, 427 U.S. at 70 (per Justice Stevens, with three Justices concurring.) If First Amendment protection

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[7] *See, e.g., 11126 Baltimore Boulevard v. Prince George's County, Maryland*, 886 F.2d 1415, 1422-23 (4th Cir. 1989); *Thames Enterprises, Inc. v. City of St. Louis*, 851 F.2d 199, 201-02 (8th Cir. 1988); *Christy v. City of Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987); *In re G & A Books, Inc.*, 770 F.2d 288, 297 (2d Cir. 1985), *cert. denied sub nom., M.J.M. Exhibitors, Inc. v. Stern*, 475 U.S. 1015 (1986); *C.I.R Corporation v. Henline*, 702 F.2d 637, 639 (6th Cir. 1983).

[8] Petitioner has also made a belated, *post hoc*, and entirely pretextual attempt to show a "secondary effects" rationalization for the Tennessee General Assembly's restricting a broad category of First Amendment protected expression by seeking refuge in the statute's legislative history. (Pet. Br. 19-22.) As a brief review of that history demonstrates, however, that effort too is unavailing. *Cf. Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 98 (6th Cir. 1981).

Petitioner has not identified a scintilla of evidence that the Tennessee General Assembly considered "secondary" effects of speech *outside* polling places. There is some discussion (Pet. Br. 19a) of making the site of polling places appear "neutral" and of keeping election materials out of the polling place. A voter's perception of either neutrality or favoritism, however, is again a *primary* effect of speech.

is "at its zenith" regarding the kind of speech regulated in the matter *sub judice* and in *Meyer v. Grant*, *supra*, *Renton* and *Young* suggest that protection of the location of pornographic movie houses is at the corresponding nadir.

In concurring in the application of a state public indecency statute to prohibit barroom-style nude dancing, one member of this Court recently opined, applying a "secondary effects" theory, "I reach this conclusion mindful, as was the Court in *Renton*, that the protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression." *Barnes v. Glen Theatre*, *supra*, 59 U.S.L.W. at 4752, n.3 (Souter, J., concurring in the judgment). As the Justice there elaborated, ". . . the secondary effects rationale on which I rely here would be open to the question if the State were to seek to enforce the statute by barring expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton* . . ." *Id.* at n.2.

Far from being "secondary effects" of pornographic materials, one of the principal interests advanced by petitioner and his *amici* -- that of encouraging maximum participation by voters whose "options are to simply not exercise their constitutional right to vote or to face a crowd surrounding the entrance" (Pet. Br. 28) -- again focuses on a primary effect: the listeners' reactions to pure political speech. *Cf. Boos v. Barry*, *supra*, 485 U.S. at 321. As the state court correctly noted, "if the State's interest in preventing voter interference . . . consists only of shielding voters from annoying campaign workers armed with cheap ball point pens and fingernail files embossed with a candidate's name, this interest cannot justify an infringement upon free speech rights." (802 S.W.2d at 214; Pet. App. 16a).

City of Renton, like its precursor, *Young v. American Mini Theatres*, *supra*, involved "merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings." 475 U.S. at 49, quoting concurring opinion of Justice Powell in *Young*, 427 U.S. at 82, n.6. This Court found the ordinance in *Renton* to be "'narrowly tailored' to affect *only* that category of theaters shown to produce the unwanted secondary effects[.]" 475 U.S. at 52 (emphasis added). This necessarily indicates that a showing of differential impact of different kinds of speech, wholly absent from the instant

case, is a condition precedent to invocation of the "secondary effects" doctrine. As the discussion above makes clear, there is nothing "secondary" about the intended effects that the State wishes to prevent here. They are the effects on the voters of election day campaigning, close to polling places where attention and interest are at their height. Accordingly, *Renton* is simply irrelevant to this case.

The statutes invalidated by the Supreme Court of Tennessee were enacted as part of an omnibus election bill, Tenn. Public Acts 1972, Chapter 740. This bill, a copy of which was appended to the reply brief filed on behalf of respondent in the Supreme Court of Tennessee, covers 183 single-spaced pages. Any discussion of the effects, "primary" or "secondary," of the dissemination of messages prohibited by the invalidated statutes is remarkably absent. Nowhere does the General Assembly make any finding that the solicitation of votes or the display or distribution of campaign materials at polling places has any different effect from that of other messages as to which § 2-7-111 is silent. Neither does the portion of the report of the Tennessee Law Revision Commission appended to petitioner's brief in this Court (Pet. Br. 41a-63a) discuss any difference between the effects of the speech criminalized by § 2-7-111 and the speech left untouched by it.

Petitioner also seeks to save § 2-7-111 by arguing that the places it covers are not public fora, and hence speech on those locations can be more readily restricted. (Pet. Br. 36-38). Aside from the fact that no case allows content-based restrictions of the kind at issue here on non-public fora, petitioner is in error largely because he fails to appreciate the public nature of polling places in Tennessee. In determining the type of forum, and hence the extent of permitted regulation, speech on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is protected by the strict scrutiny test, as is speech on property that the Government has expressly dedicated to expressive activity. *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45-46 (1983). Both of these criteria suggest that polling places and their environs are public fora.

The record is clear that the 100-foot radius in many instances extends onto public streets and sidewalks. 802 S.W.2d at 213; Pet.

App. 15a. In addition, the entire grounds of some polling places are inside the 100-foot radius. (JA 42). And in at least one instance, the 100-foot boundary extends across a street from the entrance to a polling place. (*Id.* at 24).

Public streets and sidewalks are "traditional public fora that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Boos v. Barry*, *supra*, 485 U.S. at 318, quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939). Such places "occupy a 'special position in terms of First Amendment protection.'" *Ibid.*, quoting *United States v. Grace*, *supra*, 461 U.S. at 180.

Petitioner's reliance on *United States v. Kokinda*, *supra*, is misplaced. There is no proof in the record that any street or sidewalk near to polling places is distinguishable from any other street or sidewalk in Nashville and Davidson County. Nonetheless, petitioner contends (Brief 38), without reference to the record, that "persons entering the clearly marked 100 foot boundary on election day are there only to vote." There is no evidence whatever that ordinary pedestrian and vehicular traffic on any sidewalks or streets is interrupted or suspended on election days. The streets and sidewalks referred to in the instant case in fact resemble the municipal sidewalk running parallel to the road in *Kokinda*, 110 S.Ct. at 3120, and the sidewalks comprising the outer boundaries of the grounds of this Court in *United States v. Grace*, 461 U.S. at 179. Both are examples of public forum properties where regulation of speech is subject to strict scrutiny analysis. *See Boos v. Barry*, *supra*, 485 U.S. at 318. Most important of all, *Kokinda* was a case in which the speech was the solicitation of funds, which impeded the entrance to the Post Office. Whatever that case may stand for, it surely has no applicability here since the conduct forbidden by Tennessee is pure political speech, and the permitted conduct extends to the very solicitation of funds held unlawful in *Kokinda*, so long as the money is not a request for a candidate who is on the ballot that day.

As noted above, regulation of speech on property that the Government has dedicated to expressive activity is subject to strict scrutiny. *Kokinda*, 110 S.Ct. at 3119; *Perry Education Association*, *supra*, 460 U.S. at 45. The claim by petitioner (Pet. Br. 38) and his *amici* that Tennessee has not dedicated polling places and their environs as public fora necessarily presupposes the spe-

cious notion that voting is not expressive activity. As this Court has noted, "From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates." *United States v. Classic*, 313 U.S. 299, 318 (1941). Thus, at least for election days, when people can freely come and go to vote, there is no question that these places have been dedicated to the election process, and surely the private properties, or those belonging to localities, rather than the State, have not been conscripted by the State for any other purpose, as would be necessary to make them less than public fora.

Petitioner, while acknowledging that a majority of this Court has never done so (Pet. Br. 16), suggests (albeit citing no authority therefor) that a regulation on core political speech can be both "subject-matter based" and "content-neutral." This Court has never so held, and it should not do so here. To the contrary, the Court has recognized that the First Amendment will not permit a regulation to single out election-related speech for treatment different from that afforded other messages. In *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court upheld a municipal ordinance which prohibited the posting of signs on public property. The Court specifically rejected a suggestion that an exception should be made for political campaign signs:

> ... [It is not] clear that some of the suggested exceptions would even be constitutionally permissible. For example, even though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect. An assertion that "Jesus Saves," that "Abortion is Murder," that every woman has the "Right to Choose," or that "Alcohol Kills," may have a claim to a constitutional exemption from the ordinance that is just as strong as "Roland Vincent--City Council." To create an exception for appellees' political speech and not these other types might create a risk of engaging in constitutionally forbidden content discrimination. *See, e.g., Carey v. Brown*, 447 U.S. 455 (1980); *Police Department of Chicago v. Mosley*, 408

U.S. 92 (1972).

466 U.S. at 816 (citations and footnote omitted).

Petitioner's argument illustrates the danger of applying *City of Renton*-type "secondary effects" analysis to purely political speech. If petitioner's line of reasoning were followed, several content-based regulations of speech which have been invalidated by this Court could arguably have been upheld if the government had pointed to *post hoc*, pretextual "secondary effects" reasons to justify what is otherwise an unmistakably content-based regulation. For example, under this theory, the flag-burning statute invalidated in *United States v. Eichman*, 110 S. Ct. 2404 (1990), could have been sustained as a measure to promote fire safety or to curb air pollution associated with smoke from burning United States flags. This Court in *Police Department v. Mosley*, *supra*, properly rejected the argument that demonstrations at schools by civil rights groups, students, parents or "concerned citizens" are more likely than labor picketing to produce the unwanted "secondary effects" of disruption of the educational process or the public peace, window smashing and arson. 408 U.S. at 100-01 and n.7.

There is another aspect to the operation of § 2-7-111 that further underscores the correctness of the ruling below. As respondent testified, she has received political communications at polling places, and in some cases her vote has been swayed by information she has received at the polls. (JA 28-29). She also testified to the importance of this last-minute information for local offices and for positions at the lower end of the ballot. (JA 21-22).

This Court has recognized a First Amendment right to receive information and ideas; freedom of speech necessarily protects the right to receive communications. *Virginia Pharmacy Board*, *supra*, 425 U.S. at 757. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. at 783. A "highly paternalistic approach," limiting what people may hear about the qualifications of political candidates, is generally suspect. *Eu v. San Francisco County Democratic Central Committee*, *supra*, 489 U.S.

at 223. A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with skepticism. *Id.* at 228; *Tashjian v. Republican Party of Connecticut*, *supra*, 479 U.S. at 221; *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983).

Nonetheless, the Tennessee General Assembly has apparently decided that some kinds of electioneering are inappropriate or undignified, without articulating any legitimate State interest in restricting these methods. In an ideal world, where antiseptic elections are conducted in a vacuum, it may be that voters should decide in advance of going to the polling place whom to support and that last minute appeals to emotion or friendship would be unavailing. The uncontroverted testimony in this case, however, is that the real world does not work that way. (JA 22, 29).

Petitioner has never at any point of this litigation offered any justification for limiting the First Amendment right of voters to receive information at polling places in the chilling manner effected by § 2-7-111. A general interest in insulating voters from outside influences is insufficient to justify speech regulation. "In the free society ordained by our Constitution it is not the government, but the people--individually as citizens and candidates and collectively as associations and political committees--who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley v. Valeo*, *supra*, 424 U.S. at 57.

While voting is unquestionably an expressive activity, it is but one part of the speech encompassed by the electoral process and protected by the First Amendment. "[T]he election campaign is a means of disseminating ideas as well as attaining political office." *Eu v. San Francisco Democratic Committee*, *supra*, 489 U.S. at 223. The expressive activity occurring inside polling places, *i.e.* voting, is bound up tightly with the discussion of candidates and issues that occurs in myriads of locations outside polling rooms, including streets, parks, sidewalks, newspaper editorial offices, and the grounds outside polling places. Advocacy of the election or defeat of particular candidates or political parties is therefore an essential component of the expressive activity of which polling places are expressly made a part. The First Amendment does not permit a State to say that all speech about elections in the vicinity of the polling place is out of bounds,

so that both the listener and the speaker are denied the right to discuss what is foremost on their minds. Such a restriction would be bad enough if it applied to all speech within the 100-foot radius, but to single out political speech for exclusion turns the First Amendment on its head and should be rejected, just as the Supreme Court of Tennessee did.

II. REGARDLESS OF THE STANDARD OF REVIEW, § 2-7-111 IS INVALID BECAUSE IT IS NOT NARROWLY TAILORED TO ADVANCE THE ENDS ASSERTED FOR IT.

Petitioner contends (Brief at 8) that § 2-7-111 is merely a regulation of the time, place, and manner of speech and can be upheld as such. The principal difficulty with this approach is that a "major criterion for a valid time, place and manner restriction is that the restriction 'may not be based upon either the content *or* subject matter of speech'." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (emphasis added) quoting *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*, *supra*, 447 U.S. at 536; *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). *See also Carey v. Brown*, *supra*, 447 U.S. at 470 (time, place, and manner restrictions must be "applicable to all speech *irrespective of content*") (emphasis in original); *Erznoznik v. City of Jacksonville*, *supra*, 422 U.S. at 209. But even under time, place, and manner analysis, however, § 2-7-111 is unconstitutional because, as the Supreme Court of Tennessee correctly found (802 S.W.2d at 213; Pet. App. 15a), the statute is not narrowly tailored to advance the State's asserted interests.

The principal difference between the "narrow tailoring" element of the time, place, and manner analysis and strict scrutiny is that, under the latter, a court is required to examine whether the challenged regulation is "the least restrictive means" of achieving the asserted governmental interest. This Court in *Ward v. Rock Against Racism*, *supra*, 491 U.S. at 798-99, elaborated on the differences between the two requirements:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." ... To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. . . . [Citations and footnotes omitted.]

Tenn. Code § 2-7-111 clearly "burden[s] more speech than is necessary to further the government's legitimate interests." This statute bans all "display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question" within the 100-foot boundary, without regard to whether the prohibited communication disrupts peace, order, or decorum at the polling place, interferes with the conduct of the election, or creates a risk of interference with voting, confusion, mistakes, or overcrowding -- the interests asserted by the State to defend this law.

As the Supreme Court of Tennessee cogently noted (802 S.W.2d at 213; Pet. App. 15a), petitioner's proof as to the potential interference with the electoral process "concerned the numbers of persons present in the polling place itself, not the numbers of persons outside the polls." (JA 40, 48-49). Since the challenge is to the effect of § 2-7-111 outside the polling place, it is apparent that it sweeps more broadly than is necessary to achieve the State's asserted interests. *Cf. Firestone v. News-Press Publishing Co., Inc.*, 538 So.2d 457, 459-60 (Fla. 1989) (statute which prohibited persons not in line to vote from coming within 50 feet of the polling place upheld only as to persons inside the polling room; restriction of activity outside polling place invalidated).

Examined from another perspective, the requirement of

narrow tailoring for a time, place, and manner regulation is satisfied only "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, *supra*, 491 U.S. at 799, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985). It is therefore appropriate to examine what conduct is prohibited at or near polling places by existing Tennessee statutes other than § 2-7-111 to see how necessary it is.

This Court need not speculate about the law of Tennessee since that State's Supreme Court has found in this very case that other statutes make the restrictions imposed here unnecessary to advance those ends. Thus it concluded (802 S.W.2d at 214; Pet. App. 17a) that Tenn. Code Ann. §§ 2-19-101 (Add. 4a) and 2-19-115 (Add. 5a) already prohibit voter interference and intimidation, independent of any restrictions on pure speech. In addition, Tenn. Code Ann. § 2-19-103 (Add. 4a) criminalizes any action, again without reference to speech, taken "for the purpose of preventing any person's performance of his duties under this title or exercise of his rights" under the election code. Most significantly for the claims made about possible confusion and mistakes in the casting of ballots, the persons who may enter the actual polling place during voting hours are limited by Tenn. Code Ann. § 2-7-103 (Add. 1a) to "election officials, voters, persons properly assisting voters, the press, poll watchers appointed under § 2-7-104 [Add. 2a] and others bearing written authorization from the county election commission."

That Tenn. Code Ann. § 2-7-111 treats one category of speech more stringently than other messages raises questions about whether the statute is "narrowly tailored." Where speech of one category is so burdened, in order for a court to determine that the regulation is "narrowly drawn to further a sufficiently substantial governmental interest," the government "must be prepared to articulate, and support, a reasoned and significant basis for its decision" to single out a particular category of speech. *Schad v. Borough of Mount Ephraim*, *supra*, 452 U.S. at 77 (Blackmun, J., concurring). This Court in *City of Renton v. Playtime Theatres*, *supra*, found the challenged zoning ordinances to be narrowly tailored because they affected "*only* that category of theaters shown to produce the unwanted secondary effects . . ." 475 U.S. at 52 (emphasis added).

Here, the situation is precisely the opposite. The uncontroverted testimony of petitioner's own witness is that the communication outside polling places of messages permitted by § 2-7-111 would pose exactly the same kind of problem as the forbidden solicitation of votes, carrying of signs, and wearing of buttons (JA 41):

> Q. Ms. Alexander, if there were persons at the polling places soliciting for charitable organizations inside that 100-foot boundary, would that pose the same kind of problem as persons soliciting votes inside that boundary?
>
> A. Yes, it would. And if it posed the problem, our inspectors would take care of it. We have to assure that there is no interference from anyone, as far as the voting process is concerned.
>
> Q. And isn't it true that if there is such interference, there are statutes other than the one challenged at bar, today, that are able to deal with that?
>
> A. Yes, there are statutes.

This testimony demonstrates *both* that Tenn. Code Ann. § 2-7-111 is underinclusive and that there are other statutes sufficient to correct the problems associated with solicitations outside polling places. If these other statutes are adequate to take care of problems associated with speech permitted by § 2-7-111 if such speech creates interference with the electoral process, then they are surely adequate to remedy any problems associated with solicitation of votes or the display or distribution of campaign materials which similarly interfere with the electoral process.

Petitioner must surmount yet another obstacle if he is to justify this provision as a reasonable time, place, and manner regulation: the law must leave open ample alternative channels for communication of the restricted information. *Ward v. Rock Against Racism*, *supra*, 491 U.S. at 791. Petitioner contends that this requirement is met because respondent is free to solicit votes outside the 100-foot boundary. (Pet. Br. 31-32). In making this

argument, petitioner ignores both reality and the proof at trial.

The State's witness acknowledged that at some polling places the entire grounds of the polling place are inside the 100-foot radius. (JA 42). Furthermore, at some polling places, because there is a parking area less than 100 feet from the door, poll workers are prohibited from soliciting voters who park within the 100-foot area. (*Ibid.*) Respondent also testified that, at at least one polling place, the boundary extends to the other side of a busy highway, so that there is no way to reach voters and be within the law. (*Id.* at 24).

Recognizing that the 100-foot radius, not to mention the limitations on signs, handbills, and posters on the grounds, puts a serious roadblock in the way of political speech near the polling place, petitioner makes a more frontal assault by arguing that "Ms. Freeman has 562 square miles of Davidson County except the 100 foot radius of entrances to the 164 polling places to solicit votes on election day." (Pet. Br. 32). That argument is as cogent as saying that the Birmingham newspaper editor in *Mills v. Alabama*, *supra*, had 364 days out of every year to write editorials urging people to vote one way or another in a public election and therefore had no basis for complaining about missing election day.

At bottom, petitioner's argument is merely a warmed-over version of a proposition that has been repeatedly rejected by this Court: "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad v. Borough of Mount Ephraim*, *supra*, 452 U.S. at 76-77; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Schneider v. State*, 308 U.S. 147, 163 (1939).

Here, as in *Meyer v. Grant*, *supra*, 486 U.S. at 424, the challenged statutes:

> restrict[] access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. [Citations omitted.] The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective

> means for so doing.

The uncontroverted testimony of respondent is that in-person solicitation at polling places is the most effective means of communication for many local offices. (JA 22-23). Petitioner nonetheless contends (Pet. Br. 31) that "[e]ven where a voter may park a vehicle within the one hundred foot boundary, the voter may meet with campaign workers soliciting votes beyond that boundary." As respondent's testimony suggests, that simply does not happen. (JA 24). As this Court has stated, "[w]e are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is." *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, *supra*, 425 U.S. at 757, n.15. Yet, despite this clear precedent, petitioner insists that poll workers like respondent must go elsewhere to express their political views, and that listeners willing to hear them must be denied access to information that is directly relevant to the task at hand. And all of this is done to protect interests that the Tennessee Supreme Court has held can be adequately safeguarded by other laws. Accordingly, even under the less demanding time, place, and manner standard, § 2-7-111 cannot be sustained.

CONCLUSION

Petitioner has failed to show, regardless of the standard of review, that the First Amendments permits a State to criminalize the display and distribution of campaign materials and the solicitation of votes within 100 feet of the entrance to polling places, while permitting all non-political messages and even some other political messages to be communicated at the same time and place. There is no reason to disturb either the result or the sound reasoning of the Supreme Court of Tennessee. The judgment below should therefore be affirmed.

Respectfully submitted,

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STATUTORY ADDENDUM:

The full text of the Tennessee statutes cited in this brief is set forth below:

Tenn. Code Ann. § 2-3-107 (1972) states:

> **2-3-107. Polling places – Physical requirements – Use of public buildings – Rental for private buildings.** – (a) The county election commission shall designate as polling places only rooms which have adequate heat, light, space and other facilities, including a sufficient number of electrical outlets where voting machines are used, for the comfortable and orderly conduct of elections.
>
> (b)(1) The commission shall, insofar as practicable, arrange for the use of public schools and other public buildings for polling places.
>
> (2) Upon application of the commission, the authority which has the control of any building or grounds supported by taxation under the laws of this state shall make available the necessary space for the purpose of holding elections and adequate space for the storage of voting machines without charge. A reasonable sum may be paid for necessary extra janitor service.
>
> (c) When polling places are established in private buildings, the commission may pay a reasonable rental. [Acts 1972, ch. 740, § 1; T.C.A., § 2-312.]

Tenn. Code Ann. § 2-7-103 (1972) states:

> **2-7-103. Persons allowed in polling place.** – (a) No person may be admitted to a polling place while the procedures required by this chapter are being carried out except election officials, voters, persons properly assisting voters, the press, poll watchers appointed under § 2-7-104 and others bearing written authorization from the county election commission.
>
> (b) Candidates may be present after the polls close.
>
> (c) No policeman or other law-enforcement officer

may come nearer to the entrance to a polling place than ten feet (10') or enter the polling place except at the request of the officer of elections or the county election commission or to make an arrest or to vote.

(d) No person may go into a voting machine or a voting booth while it is occupied by a voter except as expressly authorized by this title. [Acts 1972, ch. 740, § 1; T.C.A., § 2-703.]

Tenn. Code Ann. § 2-7-104 (1988) states:

2-7-104. Poll watchers. -- (a) Each political party and any organization of citizens interested in a question on the ballot or interested in preserving the purity of elections and in guarding against abuse of the elective franchise may appoint poll watchers. The county election commission may require organizations to produce evidence that they are entitled to appoint poll watchers. Each candidate in primary elections and each independent candidate in general elections may appoint one (1) poll watcher for each polling place. All appointments of watchers shall be in writing and signed by the persons or organizations authorized to make the appointment. All poll watcher names shall be submitted to the county election commission no later than noon of the day before the election.

(b) Each political party which has candidates in the election and each citizens' organization may have two (2) watchers at each polling place. One (1) of the watchers representing a party may be appointed by the chairperson of the county executive committee of the party and the other by a majority of the candidates of that party running exclusively within the county in which the watchers are appointed. If the candidates of a party fail to appoint the watchers by noon on the third day before the election, the chairperson of the county executive committee of the party may appoint both watchers representing his party. In addition, each candidate in a general election may appoint one (1) poll watcher for each polling place.

(c) Upon arrival at the polling place a watcher shall

display his appointment to the officer of elections and sign the register of watchers. Poll watchers may be present during all proceedings at the polling place governed by this chapter. They may watch and inspect the performance in and around the polling place of all duties under this title. A watcher may, through the judges, challenge any person who offers to vote in the election. A watcher may also inspect all ballots while being called and counted and all tally sheets and poll lists during preparation and certification. If a poll watcher wishes to protest any aspect of the conduct of the election, he shall present his protest to the officer of elections or to the county election commission or to an inspector. The officer of elections or county election commission shall rule promptly upon the presentation of any protest and take any necessary corrective action.

(d) No watcher may interfere with any voter in the preparation or casting of his ballot or prevent the elections officials' performance of their duties. No watcher may observe the giving of assistance in voting to a voter who is entitled to assistance. Watchers shall wear poll watcher badges with their names and their organization's name but no campaign material advocating voting for candidates or positions on questions. [Acts 1972, ch. 740, § 1; 1978, ch. 754, § 3; T.C.A., § 2-704; Acts 1981, ch. 478, § 16; 1988, ch. 933, § 11.]

Tenn. Code Ann. § 2-13-202 (1972) states:

2-13-202. Offices for which candidates are chosen in primary elections. -- Political parties shall nominate their candidates for the following officers by vote of the members of the party in primary elections at the regular August election:

(1) Governor;
(2) Public service commissioner;
(3) Members of the general assembly;
(4) United States senator; and
(5) Members of the United States house of representatives. [Acts 1972, ch. 740, § 1; T.C.A., § 2-1314.]

Tenn. Code Ann. § 2-13-205 (1986) states:

2-1-3-205. Presidential preference primaries – Date of election – Failure to have candidate's name on ballot. – On the second Tuesday in March before presidential electors are elected a presidential preference primary shall be held for each statewide political party. If no candidate will appear on the presidential preference primary ballot of a political party under § 2-5-205, no presidential preference primary shall be held for that political party. [Acts 1972, ch. 740, § 1; 1976, ch. 439, § 3; 1977, ch. 316, § 3; T.C.A., § 2-1316; Acts 1986, ch. 562, § 5.]

Tenn. Code Ann. § 2-19-101 (1972) states:

2-19-101. Interfering with nominating meeting or election. – A person commits a misdemeanor if he:

(1) Breaks up or attempts to break up any legally authorized nominating meeting or election by force or violence;

(2) Assaults or attempts to assault the persons conducting the meeting or the election officials;

(3) Destroys or carries away or attempts to destroy or carry away a ballot box or voting machine; or

(4) Uses force or violence in any other way to prevent the fair and lawful conduct of the nominating meeting or election. [Acts 1972, ch. 740, § 1; T.C.A. § 2-1901.]

Tenn. Code Ann. § 2-19-103 (1972) provides:

2-19-103. Interference with another's duties or rights. – A person commits a misdemeanor if he knowingly does any act for the purpose of preventing any person's performance of his duties under this title or exercise of his rights under this title. [Acts 1972, ch. 740, § 1; T.C.A., § 2-1903.]

Tenn. Code Ann. § 2-19-115 (1972) states:

2-19-115. Violence and intimidation to prevent voting. – It is a misdemeanor for any person, directly or indirectly, by himself or through any other person:

(1) By force of threats to prevent or endeavor to prevent any elector from voting at any primary or final election;

(2) To make use of any violence, force or restraint, or to inflict or threaten the infliction of any injury, damage, harm or loss; or

(3) In any manner to practice intimidation upon or against any person in order to induce or compel him to vote for any particular person or measure, or on account of such person having voted or refrained from voting in any such election. [Acts 1972, ch. 740, § 1; T.C.A., § 2-1915.]

Tenn. Code Ann. § 2-19-119 (1972) states:

2-19-119. Violation of § 2-7-111 while boundary signs are posted. – A person commits a misdemeanor if he violates § 2-7-111 while boundary signs are posted. [Acts 1972, ch. 740; T.C.A., § 2-1919.]

FOR ARGUMENT

(8)

No. 90-1056

In The

Supreme Court of the United States

October Term, 1990

CHARLES W. BURSON, ATTORNEY GENERAL AND REPORTER FOR THE STATE OF TENNESSEE,

Petitioner,

v.

MARY REBECCA FREEMAN,

Respondent.

On Writ Of Certiorari
To The Tennessee Supreme Court

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. TENN. CODE ANN. § 2-7-111 IS A REASONABLE TIME PLACE AND MANNER REGULATION.

A. THE RESPONDENT HAS FAILED TO REBUT THE PETITIONER'S ARGUMENT THAT TENN. CODE ANN. § 2-7-111 IS CONTENT-NEUTRAL.

1. The Respondent Is Incorrect In Her Assertion That Secondary Effect Analysis Should Not Be Applied To Electioneering Activities.

The substance of the respondent's argument concerning the applicability of the secondary effects analysis set forth in *City of Renton v. Playtime Theatres*, 475 U.S. 41, *reh'g denied*, 475 U.S. 1132 (1986) to political speech is as follows:

> Within the realm of first amendment-protected speech, this Court has sometimes sustained regulations which treat certain categories of "lesser" protected speech differently from speech which is afforded "greater" protection, based upon the subject matter of the expression. These decisions have primarily involved commercial speech, [citation omitted] and speech related to a variety of sexual topics [citations omitted]. However, this Court has never countenanced *more* stringent regulation of core political speech than other subjects of expression, and it should now reject the proposal to break new ground under the First Amendment urged by petitioner.

Respondent's Brief, pp. 9-10.

However, members of this Court have applied the secondary effects analysis to more than commercial or sexually related speech. *See Boos v. Barry*, 108 S.Ct. 1157, 1164 (1988) (O'Connor, J., joined by Stevens, J. and Scalia, J.) (political speech)[1]; *U.S. v. Kokinda*, 110 S.Ct. 3115, 3126 (Kennedy, J., concurring) (charitable speech); *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2754 (1989) (Kennedy, J., majority) (artistic speech). In each of these three cases, members of this Court have applied the secondary effects analysis of the *City of Renton* to more than just commercial or sexually-oriented speech.

Indeed, the progenitor of the *City of Renton* case upheld the federal statute prohibiting the knowing destruction or mutilation of selective service cards against a free speech challenge. *U.S. v. O'Brien*, 391 U.S. 367 (1968) (Warren, C.J., majority). In upholding the constitutionality of the law against a free speech claim, Chief Justice Warren indicated that a government regulation is sufficiently justified against a free speech challenge if: (1) "it is within the constitutional power of the government"; (2) "it furthers an important or substantial governmental interest"; (3) "governmental interest is unrelated to the

---

[1] The petitioner asserts that the "plurality in *Boos* did not in fact apply 'secondary effects' analysis; and instead found no basis to do so because the government pointed only to the primary impact of the prohibited speech." Respondent's Brief, p. 12. This position ignores the fact that Justice O'Connor utilized the secondary effects analysis test and concluded that the justifications asserted by the government were not aimed at any secondary effect unrelated to speech but were pertaining to the primary effects of "the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments." *Boos*, 108 S.Ct. at 1164.

suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." *Id.* at 377.

The respondent's concern about the "danger of applying *City of Renton*-type secondary effects analysis to purely political speech" focuses upon the government "point[ing] to *post hoc* pretextual 'secondary effects' reasons to justify what is otherwise an unmistakably content-based regulation." Respondent's Brief, p. 18. These fears are illusory where the regulation as in this case is view-point neutral, subject matter based and justified by state interests of the highest order, *i.e.*, maintaining order in and around the polling place in order to preserve the integrity of the election process.

When a regulation is view-point based, the concern in applying secondary effects analysis is that the government will suppress unpopular viewpoints by creating pretextual *ad hoc* justifications. *See City of Renton*, 475 U.S. at 59-60. (Brennan, J., dissenting). When a regulation is viewpoint neutral, but subject matter based, the concern with respect to such pretextual justifications vanishes especially where the justifications concern important state interests of protecting the purity of the election process.

For example, in *U.S. v. Eichman*, 110 S.Ct. 2404 (1990), this Court declared unconstitutional the Flag Protection Act of 1989 as being a content-based law. In particular, Justice Brennan concluded that "the Government's asserted *interest* is 'related to the suppression of free expression.' " *Id.* at 2408. The asserted government interest was "a perceived need to preserve the flag's status as a symbol of our nation and certain national ideals." *Id.* The respondent incorrectly asserts that if this Court adopts the petitioner's argument, then the Flag Protection Act could have been held valid because the government could have asserted a pretextual justification unrelated to the expressive activity, *i.e.* "a measure to promote fire safety or curb air pollution associated with smoke from burning United States Flags." Respondent's Brief, p. 18.

This argument ignores two points. First, the danger of pretextual justifications to render bans on unpopular speech content-neutral, *i.e.* pollution caused by burning flags, does not exist where the regulation is truly of an entire subject area such as electioneering. Since the regulation of an entire subject area of speech does not suppress a particular unpopular viewpoint, then there is no need for a pretextual content-neutral justification. Second, this Court has in a number of cases shown that the judiciary is quite capable of discerning when a legislative justification is pretextual or not. *See Secondary Effects and Political Speech: Intimations of Broader Governmental Regulatory Power*, 34 Vill. L. Rev. 995, 1019 (1989) ("[I]n several recent cases the Court has found an investigation into government motivation to be dispositive of the neutrality issue.") *See also, Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456,

2462 (1991) (purpose of public indecency statutes to protect morals and public order). In this case, there is no doubt that the justifications for § 2-7-111 asserted by the petitioner are legitimate concerns as to the secondary effects created by electioneering in and around the polling place on election day and not pretextual.

2. The Respondent Is Wrong In Her Contention That The Justifications For Tenn. Code Ann. § 2-7-111 Are Primary Not Secondary.

The respondent misperceives the petitioner's justifications for § 2-7-111 by asserting that encouraging maximum participation by voters focuses on the "primary effect; the listeners' reactions to pure political speech." Respondents Brief, p. 14. It is not a voter's reaction to a campaign worker's "pitch" for his or her candidate at which § 2-7-111 is aimed. Rather, the statute is concerned with the secondary effects generated by electioneering of campaign workers in and around the polling place on election day.

Both the legislative history and proof in the record support the petitioner's position. Contrary to the assertions of the respondent, the legislative justifications for § 2-7-111 are not *post hoc*, pretextual rationalizations. The absence of any discussion by the respondent of the case of *Piper v. Swan*, 319 F. Supp. 908 (E.D. Tenn. 1970) *writ of mandamus denied*, 401 U.S. 971 (1971) cited by the petitioner in his main brief highlights the weakness of her argument. In the *Piper* case, a federal district court in Tennessee in interpreting the predecessor law to § 2-7-111 cited with approval other cases which stated the very

justifications relied upon by the petitioner in this case, *i.e.* "prevent[ing] interference with efficient handling of voters by the election board" and "avoid[ing] disturbance and disorder immediately about the polls." *Piper*, 319 F. Supp. at 911.

3. The Respondent's Argument That Tenn. Code Ann. § 2-7-111 Does Not Effectively Accomplish The Justifications Asserted By The Petitioner Is Irrelevant And Incorrect In Any Event.

The petitioner asserts that if the General Assembly is concerned about the interference with "ingress and egress to polling places, it is free to prohibit that without reference to speech." Respondent's Brief, p. 12. In particular, the respondent cites to Tenn. Code Ann. § 2-7-103 which prohibits individuals from preventing the performance of an election official's duties or a person attempting to exercise his or her right to vote. This argument is a back door attempt to graft the least restrictive means test upon the content-neutrality test. Whether the means employed by the government to remedy the secondary effects created by the speech is the most effective and least restrictive is irrelevant to the question of whether the justification is based upon the speech.

Furthermore, the statutes cited by the respondent do not remedy the secondary effects created by electioneering at a polling place on election day. The petitioner has already addressed this argument in his main brief concluding that such "after-the-fact-enforcement-mechanisms" ignore the "reality that during heated elections

violence can occur, *i.e.* altercations between voters and intoxicated poll watchers." Petitioner's Main Brief, pp. 34-35. The State's interest in ensuring fair and orderly elections provides an ample basis for the conclusion that § 2-7-111 is the most effective regulation by which order can be maintained in and around the polling place.

B. THE RESPONDENT IS WRONG IN HER CONCLUSION THAT TENN. CODE ANN. § 2-7-111 IS INVALID BECAUSE IT IS NOT NARROWLY TAILORED TO ADVANCE THE ENDS ASSERTED FOR IT.

The respondent maintains that § 2-7-111 is overinclusive because it "burden[s] more speech than is necessary to further the government's legitimate interest." Respondent's Brief, p. 21.[2] Specifically, it is argued that a ban on the display of campaign materials and solicitation of votes without regard to whether these activities disrupt the peace, order and decorum of the polling place or otherwise interfere with the conduct of the election is overbroad because it occurs outside of the polling place.

---

[2] The respondent also takes the position that the statute is also underinclusive as not including every conceivable type of communication that might occur within the 100 foot boundary. Respondent's Brief, p. 23. This argument, of course, undercuts the respondent's least restrictive means argument. *Finzer v. Barry*, 789 F.2d 1450, 1465 (D.C. Cir. 1986) ("an alternative statute that restricts *every* exercise of expression regulated by the statute before us *and* other, presently unregulated, speech activities as well, is not . . . a less restrictive alternative.").

This view ignores the reality of a polling place on election day. What occurs outside the building itself naturally and obviously affects the activity within the building. A polling place is not composed of two distinct and separate parts – inside and outside. This linkage has been recognized by this Court in acknowledging the power of a state to regulate the conduct in and around the polling place in order to maintain peace, order and decorum there." *Mills v. Alabama,* 384 U.S. 214, 218 (1966). It is also recognized in the legislative history of § 2-7-111. *See* Petitioner's Main Brief, pp. 17-23.

The respondent's view is actually another attempt to incorporate a least restrictive means test into the significant state interest prong of the test for reasonable time, place and manner regulations. This argument is made despite this Court's holding that "a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the governments legitimate content-neutral interest but that it need not be the least restrictive or least intrusive means of doing so." *Ward,* 491 U.S. at 798. All that is required of the statute is the promotion of an interest that would be achieved less effectively without the statute. *Id.* at 799. Yet the respondent attempts to examine § 2-7-111 "to see how necessary it is." Respondent's Brief, p. 22.

After quoting testimony regarding charitable organizations and interference statutes, the respondent concludes that § 2-7-111 "is underinclusive and that there are other statutes sufficient to correct the problems associated with solicitations outside polling places." Respondent's Brief, p. 23. This conclusion ignores other testimony that incidents of commercial and religious

solicitations have rarely if ever occurred. (Jt. App. at 40). The following testimony regarding the intimidation statutes was also overlooked by the respondent:

> Q. Do you think that those statutes would be sufficient to take care of the problems that would be created by the chaos and confusion that you said would occur?
>
> A. No, I do not. It would take care of a portion of it and that is the intimidation and interference. But as far as the poll officials being able to operate under the manner that they should, and get the vote count in the manner in which they should, or conduct the election in the manner in which they should, I do not feel that it would be – that it would cover that.

(Jt. App. at 46).

The statutes that prohibited intimidation and interference do not solve the problem that the State of Tennessee is addressing with § 2-7-111. Those statutes are designed to punish certain activity and are as previously stated after-the-fact-enforcement-mechanisms. The State should not be required to wait until after such incidents occur. By that time, the damage is done. The integrity of the election process is compromised. Surely a State is permitted to establish a reasonable time, place, and manner regulation designed to prevent the occurrence of incidents which jeopardize the integrity of the election process.

Moreover, the intimidation and interference statutes would not prevent the confusion and delay caused by crowded conditions and zealous campaign workers whether they are allowed inside the polling place or

permitted to crowd around the entrance of the polling place. Undoubtedly, § 2-7-111 is narrowly-tailored and serves the significant state interest previously mentioned by the petitioner that would be less effectively served in its absence. Petitioner's Main Brief, pp. 28-30.

C. CONTRARY TO THE RESPONDENT'S ASSERTION, TENN. CODE ANN. § 2-7-111 LEAVES OPEN AMPLE ALTERNATE CHANNELS OF COMMUNICATION.

The respondent overstates her cases when she contends that "there is no way [for her] to reach voters and be within the law" at certain polling places. Respondent's Brief, p. 24. This contention ignores testimony that the respondent has successfully solicited votes at polling places outside the 100 foot boundary for the past seventeen years, and there have been no problems at those polling places mentioned by the respondent. (Jt. App. at 42). The respondent also mentions a voter's "right to receive communications" and claims that the State is attempting to limit what a voter may hear. Respondent's Brief, p. 18.

"The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be an opportunity to win their attention." *Kovacks v. Cooper*, 336 U.S. 77, 87, *reh'g denied* 336 U.S. 921 (1949) (Reid, J., plurality); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981). What the respondent desires is a chance to solicit every single voter who enters a polling place. Under § 2-7-111, she has a reasonable opportunity to reach all willing listeners who

come to the polling place. Voters simply walk by the solicitors on their way to vote. As for those voters parking within the 100 foot boundary who wish to exercise their right to receive additional information from a solicitor, they may take a few steps over to the campaign worker for further discussion. Campaign workers clearly have a viable alternative to soliciting within the 100 foot boundary.

The respondent has two replies to this argument. First, she argues that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad v. Borough of Mount Ephram*, 452 U.S. 61, 76-77 (1981), quoted in Respondent's Brief, p. 24. A maximum distance of 100 feet is hardly "some other place". Furthermore, case law indicates that the alternate channels of communication test does in fact permit going some other place, as in *City of Renton*, or limiting First Amendment activity to certain specified areas within a larger area as in *Heffron*. The respondent's argument also presumes that the area within the 100 feet of the entrance to a polling place is an appropriate area. The State of Tennessee maintains that it is not an appropriate area for all of the previously discussed reasons.

Second, the respondent indicates that the other avenues of communication are more burdensome. Respondent's Brief, p. 24. What the respondent really desires is the absolute right to conduct "in person solicitation at polling places," because it constitutes "the most effective means of communication for many local offices." Respondent's Brief, p. 25. All that is required for an adequate alternate channel of communication is "a reasonable

opportunity" to engage in the speech. *City of Renton*, 475 U.S. at 54. The fact that the 100 foot boundary "may reduce to some degree the potential audience for the respondent's speeches is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." *Ward*, 109 S. Ct. at 2760.

II. THE INTERFERENCE AND INTIMIDATION STATUTES CITED BY THE RESPONDENT ARE NOT LESSER RESTRICTIVE ALTERNATIVES TO ACCOMPLISHING THE STATE'S COMPELLING INTEREST IN MAINTAINING ORDER IN AND AROUND THE POLLING PLACE ON ELECTION DAY.

The respondent does not separately address the petitioner's argument that even if this Court determines that § 2-7-111 is not a reasonable time, place and manner regulation, it should still be held valid because there are no lesser restrictive means of accomplishing the State's interest in preserving the integrity of the election process at the polling place on election day. The respondent does argue that other statutes in Tennessee are able to accomplish the State's interest through a less restrictive means stating:

> This Court need not speculate about the law of Tennessee since the State's Supreme Court has found in this very case that other statutes make the restrictions imposed here unnecessary to advance those ends. Thus, it concluded [citation omitted] that Tenn. Code Ann. §§ 2-19-101 and 2-19-115 already prohibit voter interference and intimidation, independent of any restrictions on pure speech. In addition, Tenn. Code Ann. § 2-19-103 criminalizes any action, again without reference to speech, taken "for the purpose of preventing any persons performance of his duties under this title or the exercise of his rights" under the election code. Most significantly for the claims made about possible confusion and mistakes in the casting of ballots, the persons who may enter the actual polling place during voting hours are limited by Tenn. Code Ann. § 2-7-103 to election officials, voters, persons properly assisting the voters, the press, poll watchers appointed under § 2-7-104 and others bearing written authorization from the county election commission.

Respondent's Brief, p. 22.

The petitioner has already responded to the inadequacy of the criminal laws prohibiting voter interference or intimidation. Petitioner's Main Brief, p. 34. With respect to the respondent's argument that only certain individuals are allowed inside the polling place, such an argument ignores the problems which would be created by allowing campaign workers to crowd around the entrance to a polling place on election day. None of the statutes cited by the respondent prohibited campaign workers from soliciting one foot outside of the building. Furthermore, the voter interference and intimidation statutes would not adequately serve the State's interest in preventing delay and confusion around the polling place because such statutes are an after-the-fact-enforcement-mechanism[3].

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[3] Since under Tenn. Code Ann. § 2-7-103(c) no policeman or law enforcement officer may come within ten feet of the

(Continued on following page)

III. CONTRARY TO THE ASSERTIONS OF THE RESPONDENT, THE AREA OF LAND WITHIN 100 FEET OF A POLLING PLACE ON ELECTION DAY IS NOT A PUBLIC FORUM.

The respondent argues that in many instances, the 100 foot radius from the entrance of a polling place extends "onto public streets and sidewalks" and "there is no proof in the record that any street or sidewalk near two polling places is distinguishable from any other street or sidewalk in Nashville and Davidson County." Respondent's Brief, pp. 15-16. The respondent ignores § 2-7-111(a) which requires the election officials to "measure off 100 feet from the entrances to the building in which the election is to be held and *place boundary signs at that distance.*" (emphasis added)

The petitioner does not dispute the fact that individuals may pass within the 100 foot boundary of a polling place on election day. However, the land within the 100 foot boundary is analogous to postal sidewalks mentioned in the *Kokinda* case:

> No postal service regulation opens postal sidewalks to any First Amendment activity. To be sure, individuals or groups have been permitted to leaflet, speak and picket on postal premises [citation omitted], but a regulation prohibiting disruption, [citation omitted] and a practice of

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(Continued from previous page)

entrance of a polling place except upon the request of an election official to make an arrest or to vote, then a police officer could not be present at the entrance to a polling place until after unlawful disruption or interference had occurred.

> allowing some speech on postal property do not add up to the dedication of postal property to speech activities.

U.S. v. Kokinda, 110 S.Ct. at 3121.

On election day in Tennessee, both private and public buildings in the State of Tennessee are turned over to the control of election officials. Tenn. Code Ann. § 2-3-107(b)(1) provides that county election commissions are requested to arrange for the "use of public schools and other public buildings for polling places" insofar as practical. When a public building cannot be used, rent may be paid for private buildings. Tenn. Code Ann. § 2-3-107(b)(3). Thus, the area inside of each building used as a polling place on election day and within 100 feet of the entrance is dedicated to the express activity of conducting elections. *Cf. Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 47 (1983) (use of teachers' mailboxes in public schools by outside civic organizations did not render such mailboxes a public forum).

Furthermore, there is no statute specifically authorizing any type of expressive activity either commercial, political, religious, or artistic within 100 feet of a polling place on election day. In order to maintain order in the election process, electioneering is prohibited within 100 feet to the entrance of the polling place. Thus, the situation in this case is even stronger than in *Kokinda* in that no speech activities are even specifically authorized. Accordingly, § 2-7-111 should be viewed as a reasonable non-public forum regulation.

CONCLUSION

Based upon the foregoing authorities and analysis, the petitioner asks this Court to reverse the decision of the Tennessee Supreme Court and hold that § 2-7-111 does not violate the Free Speech Clause of the First Amendment.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

CHARLES W. BURSON,

Petitioner,

v.

REBECCA FREEMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

BRIEF OF AMICI CURIAE STATES OF ARIZONA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NORTH DAKOTA, SOUTH DAKOTA, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Does Tenn. Code Ann. § 2-7-111 (Supp. 1990), which prohibits the distribution of campaign literature, display of campaign materials, or solicitation of votes within 100 feet of the entrance to a polling place on election day in Tennessee, violate the Free Speech Clause of the First Amendment of the United States Constitution?

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No. 90-1056

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

CHARLES W. BURSON,
Petitioner,

v.

REBECCA FREEMAN,
Respondent.

ON WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

BRIEF OF AMICI CURIAE STATES OF ARIZONA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NORTH DAKOTA, SOUTH DAKOTA, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA, IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

I. THE STATES SHARE AN INTEREST IN PROTECTING THE ELECTION PLACE

Each of the amici states has election protection statutes which "regulate conduct in and around the polls in order to maintain peace, order and decorum there." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The statutes vary as to what activities are allowed or prohibited but all amici pro-

hibit campaigning or electioneering in the election zone; the same prohibition challenged in this case. Accordingly, one interest of these amici is in upholding the statute challenged herein because of the potential applicability of a decision here on laws of those states.

The statutes of all the states for protection of elections have been summarized by petitioner. Pet. for Cert. App. pp. 21a-50a.[1] It will be noted that the statutes vary from those like amicus West Virginia, which prohibit any activity but voting, to the more common model of the other amici, which prohibit only those specified activities the states have found or held to be disruptive to the "peace, order and decorum" of the election area.

The laws of the amici states vary too in the distance from the poll protected. This Court referred to the power of the states to regulate conduct "in and *around* the polls" in *Mills*, 384 U.S. at 218 (emphasis added).[2] Courts below, including the Tennessee court have expressed or implied those courts' judgment as to the proper zone of protection. The states' position is that the size of the protected zone is an appropriate decision for legislatures. However, if an appropriate distance may be determined beyond which the election area may not be constitutionally protected, such considerations should be delineated by this Court. This will avoid piecemeal litigation with election protection zones invalidated while states search for the distance which will satisfy the lower courts.

Under either of two analyses applied by this Court, election protection statutes should be upheld.

First, the states have established election polls and the areas defined about them as dedicated to an exclusive pur-

[1]The appendix refers to Wash. Rev. Code § 29.51.020 as "declared unconstitutional" (citing).

Only section (e) of the statute was invalidated as applied to "exit and public opinion polling" in *Herald v. Munro*, 838 F.2d 380 (9th Cir. 1988). The rest of the statute—including the prohibition on electioneering—is in effect.

[2]The court below paraphrased this as "at the polls." Pet. for Cert. App. p. 14a.

pose: conduct of elections. During the election, these areas are not public fora. At most they are special limited fora in which only the allowed activities for which they are set aside—voting—may occur.

Secondly, the prohibition on electioneering—by any party on either side of an election or ballot issue—is content neutral. The election protection statutes set forth are reasonable time, place, manner restrictions on campaigning activities, allowing adequate fora for continuous campaigning in every area except the election zone.

The amici join in urging this Court to reverse the decision below, uphold the Tennessee law, and make clear the authority of states to protect election areas (possibly including meaningful guidance as to the zone of protection).

A. Importance of Protecting the Poll Area

Voting trends in the country have shown a decline that distresses election administrators and observers. In the most recent presidential elections, the turnout has again declined from 53.10 percent of the voting population in 1984 to 50.15 percent in 1988.[3] There are many explanations for this disturbing decline. It has occurred despite the fact the states have made extensive efforts to increase voter participation. Additional registrars have been added by many states. Educational efforts and a wide variety of publicity efforts, including voter pamphlets, are all directed at increasing voter participation.

Washington is just one state with both state and local voters' pamphlets sent to all homes, not just registered voters. Wash. Rev. Code § 29.81A (1989). Absentee voting has been made as easy as possible in many states.

Most important in these efforts is the voting place itself, and the "peace, order and decorum" of the site, both to make sure that it is appropriate to the voting activity and

[3]*Federal Election Statistics; National Turnout in Federal Elections 1948-1988* (Notes, Federal Election Commission Clearinghouse on Election Administration (April 1989).

to assure the voters will return. Special efforts have been made in this regard by the states. For example, many states, including Washington, had handicapped access to election polls long before it became federal law.

Voting places are selected to ease access for all in recognition that impeded access diminishes vote. Extraordinary efforts—and often substantial costs—are incurred by states to assure access by all voters to an appropriate voting place. It is that important.

In Washington (as in other states) numerous elections have been determined by one vote—or even tied.

Setting aside an election zone serves to protect the electoral process from disruption and to avoid even the *appearance* of impropriety in the election process. This is important because, like the judicial process, the election process produces an outcome by which the rest of society must abide. Protection of the court area is surely constitutional where a form of expression might disrupt, improperly influence, or even appear to influence the outcome. *See Cox v. Louisiana*, 379 U.S. 559 (1965); *United States v. Grace*, 461 U.S. 171 (1983).

Unlike the judicial process, there is no cure for disruption, confusion and the increased possibility of error in the electoral process. The testimony below was that these are probable effects of non-enforcement of the statute in issue here (quoted by trial court, Pet. for Cert. App. pp. 49-5a).

There are other more subtle risks to the electoral process the resultant confusion, disruption and perceived possibility of error all affect a voter's perception of the importance of the vote.

The dual effects of decreasing the vote (cumulative total) and decreasing each voter's perception of the value of voting are *both* important.

In the judical process, reversal and retrial is possible. However, elections can only be reversed at great risk to other interests.

Thus, the need for rules and policies to protect the courts are comparable to the elections problem. Such court rules often prohibit certain activities in and around courts. These areas are not "public fora." For example, many courts, including this one, prohibit photography and broadcasting in courtrooms[4] and the vicinity of courtrooms. Such protection of a court has been held not barred by the first amendment. *Tribune Review Pub. v. Thomas*, 254 F.2d 883, (3rd Cir. 1958).

In the same fashion, the states must be able to protect the peace, order and decorum of the election area.

B. History of an Election Protection Statute in One State

It is helpful to observe in detail the history of such laws governing election areas in one amicus state to determine the reasonableness of these restrictions—or whether a public forum is involved at all. This Court applied such a historical analysis in *United States v. Kokinda*, 110 S. Ct. 3115, 3122 (1990): "The history of regulation of solicitation in post offices demonstrates the reasonableness of the provision here at issue." *Kokinda* at 3122.

An entire Washington constitutional article is devoted solely to elections and protection of the voting right. Wash. Const. art. VI, § 6.

Even before Washington was a state, the Laws of Washington Territory had provided for protection of the right to vote through prohibiting activities which negatively impacted voters. The Code of 1881 (Laws of Washington Territory) chapter CCXLIV § 3140 prohibited "disturbing or hindering" voters.

In 1889, the first Washington Legislature after statehood enacted a statute by which "electioneering" was prohibited "within any polling place, or any building in which

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[4]Letter of Chief Justice Rehnquist to News Organizations, October 27, 1989 declining to allow camera coverage of proceedings.

an election is being held, or within fifty feet thereof." Use of any ballot other than the official ballot was also prohibited.[5] 1889 Wash. Laws 412 § 33.

In 1947, amendments to the statute made it illegal to do "any electioneering, or [to] circulate cards or handbills of any kind." The area of protection was also extended from fifty feet to "within one hundred feet thereof" (referring to the "building in which an election is being held"). 1947 Wash. Laws 35, § 1.

The whole of the Washington elections code was recodified and reenacted at Wash. Rev. Code § 29 (1965) (1965 Wash. Laws 9 (1965)). The above prohibitions became Wash. Rev. Code § 29.51.020.

In 1983, the area covered was defined as 300 feet, and a prohibition on exit and public opinion polls added. 1983 Wash. Laws 33, 1st ex. sess.[6]

Thus, Washington has continuously proscribed electioneering within the election zone. In Washington the election place has never been a forum in which electioneering was allowed.

This is not to imply that such an extended history is necessary to establish that the election area is not a public forum (see infra pp. 7 *et. seq.*). It is appropriate to show there is no doubt that the special purpose of the voting area is otherwise, and that electioneering has been consistently determined by the Washington Legislature to be incompatible.

SUMMARY OF ARGUMENT

There are two errors in the decision of the court below. First is the failure to distinguish between public fo-

[5]This is relevant, since electioneering was, and is, sometimes done through use of a sample "ballot."

[6]Only section (e), the "exit polling" section of the Washington statute was invalidated in *Herald v. Munro*, 838 F.2d 380, 389 (9th Cir. 1988). Even this prohibition was conceded constitutional within the polling place. *Herald*, at 381, fn. 5.

rum cases and those which involve regulation of an area dedicated to a limited purpose; here, the exercise of the right to vote.

The election poll area is not the same as an airport, park or public meeting area; a voting poll area is not a public forum.

Secondly, the court failed to recognize that the prohibition on all campaigning is a content neutral regulation. Accordingly, the "least restrictive" test is not properly applied here.

Finally, the correct test is that applied by the trial court; is this a reasonable time, place, manner regulation? (The trial court correctly answered "yes.") Pet. for Cert. App. p. 5a. It may be necessary to "balance" interests; comparing the public interest in campaigning activity within poll areas with potential affects on the right to vote. In this analysis, the Court should defer to the judgment of the states' legislative bodies.

Since campaigning in the election area detrimentally impacts voting, the compelling interest of the right to vote should be held entitled to protection.

ARGUMENT

I. THE ELECTION AREA IS NOT A PUBLIC FORUM

The election area simply is not a public forum. The court below, without explicitly saying so, treats the election area (at least that from 25-100 feet) as a public forum. This is not a correct characterization of the area in question under decisions of this Court defining a public forum.

Whether a state may legitimately restrict the exercise of first amendment rights, depends in part upon the place the restriction is to protect.

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." . . . The crucial question is whether the manner of expression is basi-

> cally incompatible with the normal activity of a particular place at a particular time.

Grayned v. Rockford, 408 U.S. 104, 116 (1972).

In *Greer v. Spock*, 424 U.S. 828 (1976), the Court noted one criterion was: "the unique character of the Government property on which the expression is to take place." *Greer*, at 842.

There is a "hierarchy of forums" at which the states may restrict expressive activity. *United States v. Grace*, 461 U.S. 171, 176-78 (1983); *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990).

Put another way, this Court has said: "We have identified three types of fora 'the traditional public forum, the public forum created by government designation, and the nonpublic forum.'" *Frisby v. Schultz*, 487 U.S. 474 (1988) *quoting Cornelius v. NAACP Legal & Educational Fund*, 473 U.S. 788 (1985).

In nonpublic facilities, an activity may be excluded which interferes in any way with the functioning of that facility. *Greer v. Spock*, 424 U.S. 828 (1976) (military base), *Pell v. Procunnier*, 417 U.S. 817 (1974) (jail cell).

Though the voting area shares some attributes of nonpublic fora (see especially discussion of private properties used for voting, *infra* p. 10), the voting zone is one of the middle type fora, designated only for certain kinds of activities. As to these fora:

> the crucial question is whether the manner of expression [prohibited] is basically incompatible with the normal activity of a particular place at a particular time.

Grayned v. Rockford, 408 U.S. 104, 116 (1972).

This Court in *Grace* specified the appropriate analysis for these limited fora, when it considered a regulation applied to the grounds of this Court and the sidewalk in front. As to these grounds:

> Although the property is publicly owned, it has not been traditionally held open for the use of the public for expressive activities. . .the property is not transformed into "public forum" property merely because the public is permitted to freely enter and leave the grounds at practically all times and the public is admitted to the building during specified hours.

Grace, at 178.

The most recent consideration by this Court restated the test:

> [C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.

United States v. Kokinda, 110 S. Ct. 3115, 3122 (1990) *quoting Heffron*, 452 U.S. at 650-51.

In *Grace*, the challenged prohibitions were constitutional as to the grounds of this Court, which were not a part of the public forum. As to the surrounding sidewalks, etc., the Court said:

> We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on carrying a flag, banner, or device on the public sidewalks substantially serves these purposes.

Grace, at 182.

This Court was drawing a line between the public forum around its building and the building and grounds itself. A similar line has been drawn by each of the states to protect the elections place.

The court below seems to have mistakenly concluded that because sidewalks and parking areas may often be included in the area covered by a 100 foot election zone, this automatically made the area "public forum." This Court directly rebutted this notion in *Kokinda*:

> *Grace* instructs that the dissent is simply incorrect in asserting that every "public sidewalk" is a public forum . . . As we recognized in *Grace*, the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.

Kokinda, at 3120-21.

Respondent attempted to bolster the unstated conclusion of the court below that a public forum was involved, by distinguishing *Kokinda* through emphasizing that the government often does not own the election area, noting that:

> polling place grounds . . . in many cases are located on private property such as churches or private educational institutions. The State makes only limited, temporary use of such properties; . . ."

Brief in Opposition to Pet. for Cert. p. 7.[7]

However, this only supports the conclusion that those polling areas are not public fora. They are not public property and are arranged and set aside by the state only for the specified limited public purpose of voting. Such private areas are not "public fora" during the election, nor are they before or after.

The key to determining whether an area is a public forum is not its ownership—it is the "location and purpose." *Kokinda*, at 3121.

The states have, by the statutes in question, as well as by arranging the area for a polling place (including lease of private property used on this day only), set the voting zone aside as separate from the public forum which surrounds it.

As in *Kokinda*, this does not require a blanket prohibition of all but the dedicated (elections) use—though some states have done so. It suffices, as in *Kokinda*, that the *purpose* is clearly established. The regulation may select and prohibit activities which are known to interfere. Prohibited activities include those which either interfere with or might be anticipated to interfere with the set aside use.

Note, when dealing with the delicate area of elections, this Court has held the state need not actually allow and

[7]This implies that those making other use are guilty of trespass, since the State has arranged the use of the property only for conduct of elections.

prove actual damage (often irreparable) but may act in anticipation. "We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." (*Munro v. Socialist Workers*, 479 U.S. 189 (1986).

The impacts protected against are many, and often subtle. Many voters will turn away before voting because their election area appears crowded, not knowing that the crowding is caused in part by persons conducting last minute campaigns. The resulting congestion also makes it more difficult to conduct and police the actual election. Each of these problems is multiplied with numerous campaigns which might be expected if the decision below stands. (The record below showed over ten at one polling place.)

Another relevant consideration is that voters are "captive listeners" like the residents in *Frisby v. Schultz*, 487 U.S. 474 (1988) (if less so than bus-riders in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)). They must reach the polling place to vote. The zone at least allows the voters space to decide whether or not they wish to hear or read the campaigning message.

It may even be argued that states are *required* to provide protection of the election areas. Courts have overturned elections in extraordinary situations where the area has not been protected, *e.g.*, where intimidating crowds were allowed to gather around the election polls. *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967).

A case of less extreme facts in which an election was invalidated is *National Labor Relations Bd. v. Carroll Contracting & Ready-Mix*, 636 F.2d 111 (5th Cir. 1981). The court referred to the "'laboratory conditions' test . . . an ideal atmosphere" for elections. *National Labor Relations Bd.*, 636 F.2d at 113, citing cases. Surely, the states should be allowed to conduct elections for U.S. President

in an atmosphere no less ideal than that for a union certification.

Historically, in some states, the polling place and surrounding area have been closed to all activities other than voting. The alternative approach is taken by statutes which restrict the types of activities allowed near the polls.

Election laws of the first type require:

> all persons, except persons in the course of voting, election officers, clerks, watchers, and the like, [to] remain a certain distance from the polling place during the progress of voting.

See 29 *CJS* § 200, pp. 555-56; *Phoenix v. Superior Ct.*, 419 P.2d 49 (Ariz. 1966); *Feld v. Prewitt*, 118 S.W.2d 700 (Ky. 1938).

Statutes like those of amici take the other approach by prohibiting only those certain activities found to be problems. For example, they prohibit electioneering, campaigning, or the distribution of campaign literature within a designated zone while voting is in progress. Either approach is constitutional and within the authority of the states to decide. Both set the voting areas aside as nonpublic fora—dedicated to election purposes.

II. THE STATUTE IS A CONTENT NEUTRAL AND CONSTITUTIONAL TIME, PLACE, MANNER RESTRICTION

A. The Statute is Content Neutral

It bears repeating that this Court has held:

> The First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others.

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

The decision below has confused the test of content-neutrality as expressed by this Court, mistakenly finding the statute to be content-based.

> We, therefore find that section 2-7-111 is content based because it regulates a specific subject matter,

> the solicitation of votes and the display or distribution of campaign materials, and a certain category of speakers, campaign workers.

Pet. for Cert. App. p. 14a.

This confuses categorization based on subject matter—which may still be content neutral—with categories based on viewpoint which are not:

> The fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

Playtime Theatres v. Renton, 475 U.S. 41, 48-49 (1986) *quoting Police Dept. v. Mosley*, 408 U.S. 95-96. (See also Notes, *Renton and the Content Distinction*, 102 Harvard L. Rev. 1904, 1913, noting the strict scrutiny test is only appropriate in cases of viewpoint discrimination).

Such a distinction is vital, of course, when dealing with an area which is not a "public forum."

In the present judgment, the Tennessee court held the state must use "the least restrictive means. . . ." Pet. for Cert. App. p. 17a. This is the wrong test. Reasonable and evenhanded regulations can be applied to accomplish legitimate state interests.

Assuming arguendo that the statute imposes some burden on protected expressive activity, the impacts must be balanced against the interests to be protected, as this Court has indicated:

> Respondent's proposed activities would seem to implicate First Amendment interests.
>
> Of course, the conclusion that respondent's factual allegations implicate protected speech does not end the inquiry. "Even protected speech is not equally permissible in all places and at all times."
>
> . . .
>
> Where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests.

Los Angeles v. Preferred Communications, 476 U.S. 488 (1986).

The Supreme Court has: "repeatedly recognized the constitutionality of reasonable "time, place and manner" regulations which are applied in an evenhanded fashion." *Lehman v. Shaker Heights*, 418 U.S. 298, 311 (1974). Removing the campaigners (along with other specified activities) to a reasonable distance from the election polls is both reasonable and evenhanded.

That the zone in question was both reasonable and necessary was the conclusion of the voting official who testified. It was, of course, the judgment of the State Legislature which established it. While it is sometimes a convenient fiction to assume legislators are educated in the myriad matters on which they legislate—on elections they qualify as experts.

A balancing is required, weighing the interests protected by the state with the first amendment interests impacted, if any.

> It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest.

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). The interest of the state in protecting its elections will be discussed below to show such an interest is much *greater* than the aesthetic interests considered in *Vincent*.

In *United States v. Kokinda*, the Court upheld a ban on solicitation on the sidewalk before post offices. In *Frisby v. Schultz*, it upheld a prohibition on picketing before a single residence. These similar regulations served interests much less important than the right to vote which is implicated here.

This statute has not prohibited campaigning and related speech on election day as in *Mills v. Alabama*, 384 U.S. 214 (1966). It merely keeps the robust debate from continuing into the election area.

The testimony below was that ten or more campaign workers were observed outside the zone at one single election area. Pet. for Cert. p. 4. The regulation kept them a short distance from the polls. The witness—and trial court said that but for the restriction, there would be interference with voting, confusion and overcrowding, and mistakes made by election officials. Joint App. at 46; Pet for Cert. App. 4a-5a.

Other problems which reasonably could be envisioned would include arguments between partisans, further disrupting the election areas. Legislators are well qualified to consider the probabilities of such occurrences—though surely knowledge of the capability of campaigning to cause congestion, confusion, and stir argument is hardly unique to legislators.

The result of this slight restriction on the area for campaigning is not to diminish political debate (which has flourished in states with such statutes). Under these statutes, the respondents and others like them remain free to speak, publish or broadcast whatever and however they like.

What the respondents are not free to do, however, is to continue the election debate into the election place. While they are still free to campaign, neither they nor anyone else can do it within a zone defined by the state as part of the voting place.

B. The Interest of the State; the Right to Vote and Protection of Election Polls

Each state's election protection statute implements the constitutional right to vote and safeguards a place for its exercise. The court below failed to fully discuss the right to vote and how it is implicated in this case. Thus, neither the United States constitutional provisions providing for elections, (U.S. Const. art. I, §§ 2, 4 and art. III § 1), nor the many important cases on the subject of the right to vote were mentioned.

These constitutional provisions do more than delegate authority to the states to legislate for elections. The Constitution confers a constitutional right to vote which the states are required to protect: the right to vote in federal elections is conferred by the art. I, § 2. U.S. Constitution. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966), citing *United States v. Classic*, 313 U.S. 299 (1960).

If prioritizing of rights is necessary in this case, the right to vote is fundamental: "The political franchise of voting [is] a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

The most important question in this case is one of protecting voting. The primacy of the voting right is clear and unnecessary infringement of that right is not to be tolerated because of incidental or speculative impact on first amendment rights:

> Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533 (1964).

The demand to be allowed in and around the election polls to harass voters for last minute campaigning is properly regulated by the states. When this last minute campaigning in an election area and the resulting congestion, confusion and possible errors in elections, are subjected to the "careful meticulous scrutiny" the Court suggested above, it will be found the state's regulation is justified.

This Court has once given specific consideration to the appropriateness of measures to protect the election. *Mills v. Alabama*, 384 U.S. 214 (1966). In invalidating a "prior restraint" statute prohibiting editorial comment the day before the election, the Court took care to note that the decision did not imply the state could not protect the election polls:

> We should point out at once that this question in no way involves the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there. . . .

Mills, at 218.

Clearly, the states have such power and are probably required to exercise it where necessary to protect the right to vote.

The legitimacy of the interests which the states seek to preserve in their election statutes was again recognized by the Court in *Brown v. Hartlage*, 456 U.S. 45 (1982):

> We begin our analysis . . . by acknowledging that the States have a legitimate interest in preserving the integrity of their electoral processes . . . a State has a legitimate interest in upholding the integrity of the electoral process itself.

Brown, at 52.

The interest of the State in adopting the statute here in question is surely greater than the governmental interests involved in *Houchins v. KQED*, 438 U.S. 1 (1978), *Kokinda*, 110 S. Ct. 3115 (1990), or *Frisby*, 487 U.S. 474 (1988). In *Houchins*, the interest was prevention of possible disruption in the running of a jail. In *Kokinda*, it was to avoid disrupting the postal service' business, and in *Frisby*, to protect residential privacy.

Here, the interest of the State is in safeguarding the most important right that citizens enjoy, the right to vote free from "interference with voting, confusion, and overcrowding at the polling places and mistakes made by election officials" Trial court quoting state witness, Pet. for Cert. App. 5a.

Like an individual returning to his home in *Frisby*, the voter is in large part a captive audience. Establishing a protected zone with a perimeter around the election area establishes a balance by allowing the voter to exercise a choice of whether he is willing to receive the proferred campaign message, or prefers to go directly to vote.

The statute challenged was adopted for the protection of the integrity of the electoral process. This interest is sufficiently substantial to justify any incidental impact on the respondent. The trial court had concluded the State's interest was "a compelling state interest with respect to the protection of voters and election officials from interference, harassment or intimidation during the voting process." Pet. for Cert. App. p. 5a.

The Tennessee Supreme Court admitted "the State unquestionably has shown a compelling interest in banning solicitation of voters or distribution of campaign materials *within the polling place itself*" but held this interest did not extend to 100 feet—and/or that a "less restrictive" boundary was appropriate (suggesting, but not holding 25 feet would be upheld). Pet. for Cert. App. p. 18a (emphasis in original). Under the appropriate test, the regulation—and the zone chosen by the state—should be upheld.

CONCLUSION

The polling place exists for a very limited time and for one limited and clearly designated activity: voting. The sanctity of the act and place could be the subject of extended metaphysical discussion. Elections are probably even more important than the courts and the judicial process (with all due respect to the present forum). The voting function, like that of courts, requires a protected area.

States have properly acted to defend the constitutional right to vote by enacting an election law intended to protect that right and the place in which it is exercised.

The statute challenged is a constitutional exercise of the "state's power to regulate conduct in and around the polls in order to maintain peace, order and decorum . . ." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

The contrary decision of the court below should be reversed.

DATED this 10th day of June, 1991.

Respectfully submitted,

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(6)

No. 90-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES W. BURSON,
ATTORNEY GENERAL AND REPORTER
FOR THE STATE OF TENNESSEE,
Petitioner,

v.

REBECCA FREEMAN,
Respondent.

On Writ of Certiorari
to the Supreme Court of Tennessee

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Tenn. Code Ann. § 2-7-111, which prohibits the distribution of campaign literature, display of campaign materials, or solicitation of votes within 100 feet of the entrance of a polling place on election day in Tennessee, violates the Free Speech Clause of the First Amendment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1056

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ATTORNEY GENERAL AND REPORTER
FOR THE STATE OF TENNESSEE,
Petitioner,

v.

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BRIEF OF THE
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MUNICIPAL LAW OFFICERS AS *AMICI CURIAE*
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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments. This case

presents an issue of great concern to *amici*: the constitutionality of state regulations governing electioneering immediately outside the entrances to polling places. Almost every State forbids electioneering within a specified number of feet of a polling place on election day. *See* Pet. App. at 21a-50a. The prohibition of electioneering within 100 feet of a polling place contained in Tenn. Code Ann. § 2-7-111 is typical of those provisions.

Amici believe that the Tennessee Supreme Court erred in ruling that § 2-7-111 violates the First Amendment. An affirmance of that decision would call into question the validity of comparable provisions in the election laws of other States, even though the validity of those laws has gone unquestioned for many years. *Amici* accordingly submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Amici adopt petitioner's statement of the case.

SUMMARY OF ARGUMENT

1. The States' authority reasonably to regulate elections and the electoral process is established by a long line of this Court's decisions. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Storer v. Brown*, 415 U.S. 724 (1974). The Court has expressly recognized that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 730. Given the compelling state interests served by § 2-7-111, the statute falls well within the range of reasonable regulations of the electoral process that the Court has upheld against First Amendment challenges.

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[1] The parties' letters of consent have been filed with the Clerk pursuant to this Court's Rule 37.3.

2. Almost every State has a law that, like § 2-7-111, establishes a boundary area around the polls in which electioneering is prohibited, a fact that demonstrates the widespread belief that such restrictions are necessary to the conduct of elections. Restrictions on electioneering immediately outside entrances to polling places serve several overlapping governmental interests. First, these restrictions help to protect the integrity of the election process by minimizing the possibilities (either in actuality or in appearance) for voter intimidation or governmental favoritism. Second, the restrictions help to preserve decorum around the polls by minimizing the possibilities for disorder and confusion. Third, restrictions on electioneering prevent congestion in front of polling places that could discourage some persons from voting. Finally, those restrictions prevent voters from being a captive audience to unwanted political solicitation.

3. Under this Court's decisions, these governmental interests, both separately and cumulatively, are compelling ones. The Tennessee Supreme Court did not rule otherwise in striking down § 2-7-111. Instead, that court held that § 2-7-111 was not the least restrictive means of advancing these interests. This holding was based in part on the existence of statutes outlawing voter intimidation and interference. In *Buckley v. Valeo*, 424 U.S. 1 (1976), however, the Court held that Congress could enact laws limiting campaign contributions to deal with the actuality and appearance of *quid pro quo* arrangements between elected officials and campaign contributors, even though there were already laws against bribery. Section 2-7-111 likewise provides necessary additional protection against the actuality and appearance of voter intimidation and interference with the electoral process.

The Tennessee Supreme Court also indicated that a more narrowly drawn restriction on electioneering, such as a 25-foot boundary, would be valid. *See* Pet. App. at 18a; *see also id.* at 19a (Fones, J., dissenting). But

Buckley v. Valeo also held that numerical limitations like the 100-foot boundary cannot be overturned on the ground that another numerical limitation might be a less restrictive means, unless the difference between the two limitations is so significant as to be a difference in kind. *See* 424 U.S. at 30. There is no basis on this record for concluding that the difference between the 100-foot limitation and a 25-foot limitation would be a difference in kind or, conversely, that a 25-foot limitation would serve Tennessee's interests as well. The Tennessee Supreme Court's judgment should accordingly be reversed.

ARGUMENT

SECTION 2-7-111 IS A REASONABLE REGULATION OF THE ELECTORAL PROCESS THAT SERVES COMPELLING STATE INTERESTS

Tenn. Code Ann. § 2-7-111 bars the display of campaign posters, distribution of campaign materials, and solicitation of votes within the area 100 feet from the entrance to a polling place. Respondent Rebecca Freeman, and those similarly situated, remain free under Tennessee law to solicit votes outside the 100-foot boundary established by § 2-7-111. Indeed, Ms. Freeman testified at trial that she has regularly—and successfully—solicited votes near polling places on election days for 17 years. J.A. at 18, 21-22. The issue presented is whether a state statute that requires that all electioneering be conducted at this reasonable distance from the entrances to polling places is unconstitutional.

"The present case is a good example of Justice Holmes' aphorism that 'a page of history is worth more than a volume of logic.'" *United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 120 (1981) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). Almost every State has adopted a law that prohibits electioneering within a specified number of feet of a polling place. *See* Pet. App. at 21a-50a. The 100-foot

boundary chosen by Tennessee is typical. Whatever their precise formulation, the prevalence of such statutes and regulations is indicative of the widespread belief that restrictions on electioneering immediately outside the entrances to polling places are necessary to the conduct of free, fair, and orderly elections.[2] It has been assumed until recently that such restrictions on electioneering were valid exercises of state authority.[3]

Amici respectfully submit that the Court should give great weight to the long and widely held view that restrictions on electioneering immediately outside of polling places, such as those contained in § 2-7-111, are a valid and reasonable means of effectuating the States' compelling interests in regulating the electoral process. *Cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) (plurality opinion of White, J.) ("hesitat-[ing] to disagree with the accumulated, common-sense judgments of local lawmakers" concerning reasonable regulations of speech).

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[2] Like the States, the NLRB bars electioneering at or near polling places in union representation elections. *See, e.g., Michem, Inc.*, 170 N.L.R.B. 362 (1968); *Claussen Baking Co.*, 134 N.L.R.B. 111 (1961). The courts of appeals have upheld such regulation of electioneering by the NLRB. *See, e.g., Season-All Industries, Inc. v. NLRB*, 654 F.2d 932 (3d Cir. 1981); *NLRB v. Carroll Contracting & Ready Mix, Inc.*, 636 F.2d 111 (5th Cir. 1981); *Midwest Stock Exchange, Inc. v. NLRB*, 620 F.2d 629 (7th Cir.), *cert. denied*, 449 U.S. 873 (1980).

[3] A century ago the New Jersey Supreme Court upheld a ban on electioneering within 100 feet of a polling place against a free speech challenge based on the State's constitution. Its analysis remains pertinent today:

> The regulation is a proper one, to avoid disturbance and disorder immediately about the polls. While a man has a right to express his opinions, the exercise of this right, like all other rights is the subject of reasonable police regulation.

State v. Black, 54 N.J.L. 446, 24 A. 489, 491 (Sup. Ct. 1892), *aff'd per curiam sub nom. Ransom v. Black*, 65 N.J.L. 688, 51 A. 1109 (Ct. Err. & App. 1900).

A. The States May Reasonably Regulate the Electoral Process

The States have compelling interests in "maintain[ing] peace, order and decorum" at the polls, *Mills v. Alabama*, 384 U.S. 214, 218 (1966), and in "preserv[ing] the integrity of their electoral processes." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The States are, in fact, primary guardians of the electoral process. The power to regulate state elections is reserved to the States by the Tenth Amendment. *See Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Black, J., announcing judgment of the Court). Towards this end,

> States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). The Court accordingly has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Id.* at 788 & n.9 (collecting cases).

For example, the Court has repeatedly upheld regulations concerning qualification for a place on the ballot. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986); *American Party of Texas v. White*, 415 U.S. 767, 782 & n.14 (1974); *Storer v. Brown*, 415 U.S. 724, 736 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). It has done so even though the right to associate for the

"common advancement of political beliefs" is integral to the First Amendment's protection of free expression, *see Kusper v. Pontikes*, 414 U.S. 51, 56 (1973), and the "exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day." *Anderson v. Celebrezze*, 460 U.S. at 787-88.

Thus, in *Storer v. Brown*, the Court sustained against First Amendment challenge a state statute that denied ballot access to an independent candidate if the candidate had been affiliated with any political party within one year prior to the immediately preceding primary election. The Court grounded its holding on "the State's interest in the stability of its political system." 415 U.S. at 736.

Similarly, in *Munro v. Socialist Workers Party*, the Court upheld a State's requirement that a minor-party candidate for an office receive at least 1% of votes cast for that office in a primary election before the candidate's name could be placed on the general election ballot. The Court emphasized that the First Amendment rights asserted by the candidate were "not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively." 479 U.S. at 193. *See also Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973) (upholding state statute requiring voters to be affiliated with a party for 11 months as a prerequisite to voting in that party's primary).

Several important principles emerge from these cases. A reasonable, nondiscriminatory electoral regulation is not "invidious or arbitrary" and should be sustained if it is specifically designed to remedy an evil that could undermine "the integrity of the electoral process." *See Storer v. Brown*, 415 U.S. at 731 (internal quotations omitted). In this area of state regulation, moreover,

> the Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for

> the entire citizenry, merely in the interest of particular candidates and their supporters . . . .

Id. at 736.

Furthermore, the State need not make a "particularized showing" of "voter confusion" or other such problems "prior to the imposition of reasonable restrictions". *Munro*, 479 U.S. at 194-95. Nor does the State bear a "burden of demonstrating empirically the objective effects on political stability that [are] produced" by the regulation in question. *Id.* at 195. On the contrary,

> such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. at 195-96.

Recognizing the substantial state interests at stake, the Court, in reviewing challenges to specific provisions of a State's election laws, has not employed any " 'litmus paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. at 789 (quoting *Storer v. Brown*, 415 U.S. at 730). Instead, as the Court stated in *Anderson*, a reviewing court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's right.

Id. Balancing these factors, the Court has on numerous occasions upheld restrictions contained in state election laws against First Amendment challenges. *See* cases cited *supra* at 6-7. The Court should likewise uphold the 100-foot boundary established by § 2-7-111. As *amici* show below, § 2-7-111 serves compelling state interests in a narrowly tailored fashion, while imposing minimal burdens on respondent's First Amendment rights.

B. The Restrictions on Electioneering Contained in § 2-7-111 Serve Compelling State Interests

1. *The Purposes Underlying § 2-7-111*

The general purposes of Tennessee's election laws, set out in Tenn. Code Ann. § 2-1-102, include securing the "freedom and purity of the ballot" and encouraging the "[m]aximum participation by all citizens in the electoral process." In 1972, the State's Law Revision Commission proposed retention of the 100-foot boundary now contained in § 2-7-111 because it protected "the purity of elections" and made "the site of polling places as neutral as reasonably possible."[4] The trial court explained the "purity" purpose in more specific terms, finding that § 2-7-111 protects "voters and election officials from interference, harassment or intimidation during the voting process." Pet. App. at 5a. The Tennessee Supreme Court did not overturn this finding, just as it did not contest the "State's rationale for the 100-foot 'buffer zone' around polling places [as being] the prevention of interference with voting, confusion, mistakes, and overcrowding at polling places." Pet. App. at 14a. Indeed, the

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[4] Tennessee Law Revision Comm'n, *Special Report of the Law Revision Commission to Eighty-Seventh General Assembly of Tennessee Concerning a Bill to Adopt an Elections Act Containing a Unified and Coherent Treatment of All Elections* at 13 (1972) (reprinted in Appendix to Petitioner's Brief); Tennessee Law Revision Comm'n, *An Elections Act Recommended to the Eighty-Seventh General Assembly by the Law Revision Commission with Section-by-Section Comments* at 91 (1972) (reprinted in Appendix to Petitioner's Brief).

court acknowledged that the State has "an interest in maintaining peace, order and decorum at the polls and 'preserving the integrity of their electoral processes.'" *Id.* (quoting *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) and citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

The analysis of the Tennessee courts—as well as that of courts in other States[5]—establishes that the following compelling interests are served by the prohibition of electioneering outside the entrances to polling places: (1) protecting the integrity of elections against the actuality or appearance of voter intimidation by campaign workers and against the actuality or appearance of governmental favoritism in regulating those workers; (2) promoting a measure of decorum appropriate to polling places; (3) minimizing congestion near the entrances to the polling places that could discourage potential voters from voting; and (4) preventing voters waiting to vote from becoming a captive audience to unwanted political solicitation.

2. *Protecting the Integrity of Elections*

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San*

[5] *See State v. Robles*, 88 Ariz. 253, 355 P.2d 895, 897 (1960) ("The purpose of these notices, limiting the area within the [50-foot] boundaries of which voters who have voted and other interested persons other than those named in the Act may not remain, is to prevent interference with the efficient handling of the voters by the election board and to prevent delay or intimidation of voters entering the polling place by political workers seeking a 'last chance' effort to change their vote."); *Feld v. Prewitt*, 274 Ky. 306, 118 S.W.2d 700, 703 (1938) (purpose of 50-foot boundary is to preserve the secrecy of the ballot); *Xippas v. Commonwealth*, 141 Va. 497, 126 S.E. 207, 208 (1925) (purpose of election law including among other provisions a 100-foot boundary was "to secure regularity in the conduct of elections and primaries, to secure fairness in elections and primaries, and to prevent and punish any corrupt practices in connection therewith"); *State v. Black*, 24 A. at 491 (purpose of 100-foot boundary around polling place is "to avoid disturbance and disorder immediately about the polls.").

Francisco County Democratic Comm., 489 U.S. 214, 231 (1989). Restrictions on electioneering immediately outside the entrances to polls further this compelling interest by protecting against voter intimidation and political favoritism.

a. *Preventing Voter Intimidation.* The prohibition of electioneering outside the entrances to polling places serves a State's interest in electoral integrity because it lessens opportunities for voter intimidation and interference with elections. Under the regime established by § 2-7-111, a voter is given a safe haven from campaign workers. In the absence of § 2-7-111, each entrance would become a potential base for last-second efforts to intimidate susceptible voters by pressuring them to vote in a particular way or by discouraging them from voting at all.

The Tennessee Supreme Court generally dismissed the possibility of voter intimidation with its allusion to voters being accosted by "annoying campaign workers armed with cheap ball point pens and fingernail files embossed with a candidate's name." Pet. App. at 16a. But elections in the United States have not invariably been conducted under pristine conditions.[6] Nor are such concerns

[6] One commentator, writing in 1934, stated: "Not many years ago it was taken for granted that there would be a great deal of drunkenness, disorder, violence, bribery, and other malpractices at the polls." J. Harris, *Election Administration in the United States* 20 (Brookings Institution, Institute for Government Research, Studies in Administration No. 27, 1934).

Tennessee has not been without challenges to the integrity of its elections. "It is common knowledge," it was written in 1947, "that the administration of election in Tennessee has been accused by allegations of many irregularities, sharp practices, and frauds." *Report of the Election Law Commission to the Seventy-Sixth General Assembly of Tennessee* 8 (1947) (quoted in Tennessee Legislative Council Committee, *Study on Election Laws, 1966, Final Report* 6 (1966)).

entirely a thing of the past. The State's witness at the trial, the Registrar for Davidson County, testified that she had witnessed election day "incidents", including an altercation "between a voter and an intoxicated poll watcher" that resulted in one of them being hospitalized. J.A. at 39. At a minimum, a prohibition of electioneering outside the entrances to polling places reduces the potential for disorder and voter intimidation.

It is no answer to these concerns to point out, as the Tennessee Supreme Court did, that there are other statutory provisions that make voter intimidation or interference with an election a crime. *See* Pet. App. at 16a-17a & n.2 (quoting Tenn. Code Ann. §§ 2-19-101, -115). These criminal laws cannot deal with the problem until the election is over; a State has a compelling interest in not having to repeat elections. *See Munro*, 479 U.S. at 195-96. As a practical matter, moreover, criminal laws can be expected to remedy only egregious cases. The Court held in analogous circumstances in *Buckley v. Valeo*, 424 U.S. 1 (1976), that limitations on campaign contributions were a valid way to protect against the corruption of *quid pro quo* arrangements between elected officials and contributors, even though there were already laws against bribery, because those laws "deal with only the most blatant and specific attempts of those with money to influence governmental action." *Id.* at 28.

The Court further held in *Buckley v. Valeo* that a government has a right not only to legislate against the actuality of improper influence in the election process, but also against its appearance. "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical.'" 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)); *accord FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982). A state legislature could reasonably conclude that crowds of campaign workers ag-

gressively soliciting votes at entrances to polling places would create the appearance of intimidation.

b. *Protecting Against Favoritism.* The restrictions on electioneering contained in § 2-7-111 also protect the integrity of the voting process by helping to ensure government neutrality. When all electioneering is conducted at a specified distance from the polling place, all campaign workers are placed on an equal footing to solicit votes. If voter solicitation can be conducted right up to the door of the polling place, the relative position of campaign workers will become important. It could appear to voters that the campaign workers who occupy the most favorable positions near the entrance are those whose candidate or position is favored by the incumbent authorities.

Tennessee, like other States, has a compelling interest in protecting its voting process against the appearance of governmental favoritism, for that appearance creates doubts in the voters' minds about the integrity of the election process. In that respect this case is like *CSC v. Letter Carriers*, in which the Court upheld the Hatch Act on the ground that "it is not only important that the Government and its employees in fact avoid practicing *political* justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S. at 565 (emphasis added). *Cf. Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 809 (1985) ("[A]voiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum."); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion of Blackmun, J.) (city can bar political advertising on transit system in part because there "could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians").

3. *Protecting the Decorum of the Polls Against Disorder and Confusion*

An interest closely related to protecting the integrity of the election process is that of minimizing disorder at the polls. Electioneering can be heated, especially if campaign workers are allowed to cram into close quarters immediately outside the entrances to polling places. A State could reasonably conclude that disorderly conduct is likely to occur in such a highly charged setting. Such conditions at the polling place are inimical to the ideal of the American democratic process, in which voters freely cast their votes after thoughtful deliberation in an atmosphere of peace. Restrictions on electioneering immediately outside the entrances to polling places help to preserve a measure of decorum around the polls and prevent disorder and confusion by keeping campaign workers at a reasonable distance.[7]

The court below conceded the validity of the State's interest in protecting the decorum of the polls. Pet. App. at 14a. More significantly, this Court has also recognized this interest In *Mills v. Alabama*, the Court struck down a law that made it a crime for a newspaper editor to publish an editorial on election day urging persons to vote in a particular way. *See* 384 U.S. at 219-20. The Court was careful, however, to "point out at once that this question in no way involves the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order, and decorum there." *Id.* at 218.

4. *Minimizing Congestion So as To Maximize Voter Participation*

Another purpose of the 100-foot boundary established by § 2-7-111 is to prevent congestion around the entrances to polling places. Such congestion may obstruct ingress and egress to such an extent that voters are discouraged from voting. Any such result would be contrary to Tennessee's declared policy of encouraging "[m]aximum participation by all citizens in the electoral process." Tenn. Code Ann. § 2-1-102.

[7] Moreover, crowds of campaign workers milling around outside the entrances to polling places can lead to errors by election officials. The Registrar of Davidson County testified that without the 100-foot boundary, there would be "mass confusion" and the "possibility of mistakes" by election officials. J.A. at 47.

The State's interest in ensuring ready access to and from polling places is surely a compelling one in First Amendment jurisprudence. The Court has recognized this interest in similar contexts. In *Cameron v. Johnson*, 390 U.S. 611 (1968), the Court upheld against a facial attack a statute prohibiting the picketing of a courthouse in such a manner as to obstruct or unreasonably interfere with access to it. *See also Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion of O'Connor, J.) (noting that the District of Columbia's prohibition of displays near embassies had not been justified as necessary to prevent "congestion" or "interference with ingress or egress").

5. *Protecting a Captive Audience*

The 100-foot boundary established by § 2-7-111 prevents voters from becoming a captive audience for campaign workers. The Registrar for Davidson County testified that she had received complaints from voters who "felt like . . . their rights, their privacy was infringed upon by the handing out of campaign material." J.A. at 40. Those voters would no doubt agree with the NLRB's position, taken in the context of union representation elections, that "[t]he final minutes before [a person] casts his vote should be his own, as free from interference as possible." *Michem, Inc.*, 170 N.L.R.B. at 362.

For the sake of argument, one may agree that the voters' desire to be left alone may not be particularly weighty as against campaign activity conducted at a dis-

tance from the polling place, for at sufficient distances voters can avoid campaign workers with relative ease. *Cf. Cohen v. California*, 403 U.S. 15, 21-22 (1971); *Schneider v. State*, 308 U.S. 147 (1939). The voters' interest in not being a captive audience, however, becomes compelling at distances close to the entrances to polling places where voters may have to line up to vote. Without a reasonable boundary, even voters inside the polling place may be within talking distance, and certainly within shouting distance, of campaign workers.

Under these circumstances, voters are as entitled to protection from unwanted political solicitation as were the commuters in *Lehman v. City of Shaker Heights*, in which the Court upheld a ban on political advertising in a city's transit system, partly on the ground that commuters were a captive audience. *See* 418 U.S. at 304 (plurality opinion of Blackmun, J.) (citing the "risk of imposing upon a captive audience"); *id.* at 308 (Douglas, J., concurring) ("I do not believe that petitioner has any right to spread his message before this captive audience.").

C. Section 2-7-111 Is Narrowly Tailored To Serve the State's Interests

Rather than disapprove of the interests served by § 2-7-111, the Tennessee Supreme Court held that the 100-foot boundary was not the least restrictive means of advancing those interests. *See* Pet. App. at 15a-17a. The court suggested, first, that the criminal laws against voter interference and intimidation were adequate to serve the State's interests. *See id.* at 16a-17a. Those statutes deal only with the most blatant forms of coercion, however, and then only after the fact. *See* discussion *supra* at 12-13. *Buckley v. Valeo* held that a government can properly legislate to prevent more subtle forms of improper influence, as well as the appearance of such influence. *See* 424 U.S. at 27-28.

The Tennessee Supreme Court also suggested a more narrowly drawn boundary (such as 25 feet) "might perhaps pass constitutional muster." Pet. App. at 18a (citing *NBC v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988)). There is, however, no basis for concluding that, given the need for some restriction on electioneering outside the entrances to polling places, a 25-foot boundary is valid, but a 100-foot boundary is not. In *Buckley v. Valeo*, for example, the Court declined to rule that a $1,000 contribution limit was unnecessarily low: "As the Court of Appeals observed, '[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as a $1,000.' . . . *Such distinctions in degree become significant only when they can be said to amount to differences in kind.*" 424 U.S. at 30 (quoting *Buckley v. Valeo*, 519 F.2d 821, 842 (D.C. Cir. 1975)) (emphasis added).

At some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become a total ban akin to the statute struck down in *Mills*. *See* 384 U.S. at 216 n.2, 220 (striking down law that prohibited any soliciting of votes on election day). But this is plainly not what the Tennessee legislature has done here. Although there may be a theoretical bright line at which reasonable regulation becomes unreasonable restraint, it is both unnecessary and inadvisable for this Court to declare where that line is and thereby "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). *See also Anderson v. Celebrezze*, 460 U.S. at 789 (in reviewing challenges "to specific provisions of a State's election laws," the Court has not employed any "litmus paper test that will separate valid from invalid restrictions") (internal quotations omitted). It suffices to say that in establishing a 100-foot boundary, the Tennessee legislation is on the constitutional side of the line.

D. Section 2-7-111 Is Not Underinclusive

Although it does not prohibit non-political speech near entrances to polling places, § 2-7-111 is not underinclusive, nor is there any support in the record for such a conclusion. At trial, respondent testified only to a vague recollection of having once seen commercial solicitation at a polling place, and she did not say that this solicitation took place inside the 100-foot boundary. J.A. at 24. The Registrar for Davidson County testified that she was not aware of any instance in which a commercial entity or a religious denomination had passed out literature within the 100-foot boundary on election day. J.A. at 40. There is no basis for concluding that non-political solicitation presents the same dangers of disorder and congestion as does electioneering, for there is no evidence that non-political solicitation occurs near polls to any significant degree. And there is no reason at all to conclude that non-political solicitation carries with it the same potential dangers to the integrity of the election process as would unregulated electioneering at the entrance to polling places.

Tennessee and those States with similar laws that apply only to electioneering have been conducting elections for many decades. A state legislature could reasonably conclude that only electioneering poses such dangers as intimidation, congestion, and other threats to the integrity of the electoral process. There is no reason for striking down laws, such as § 2-7-111, that regulate the forms of solicitation that, in the legislature's judgment, do present potential dangers to the electoral process, merely because those laws do not regulate other forms of solicitation. As Justice O'Connor stated for the plurality in *United States v. Kokinda*, 110 S. Ct. 3115, 3123 (1990), it would be "anomalous that the [government's] allowance of some forms of speech would be relied upon as evidence that it is impermissibly suppressing other speech." *See also Renton v. Playtime Theatres, Inc.*, 475

U.S. 41, 52-53 (1986) (declining to invalidate zoning ordinance that regulates the secondary effects of adult theaters merely because it fails to regulate other adult businesses not present in the city; no basis for assuming city will not regulate such other businesses if warranted in future) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955)).

CONCLUSION

The judgment of the Supreme Court of Tennessee should be reversed.

Respectfully submitted,

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